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183-9178

STATE OF LOUISIANA * NUMBER B-4420
*
VS * 20TH JUDICIAL DISTRICT COURT
*
HENRY BROWN, WILLIE KELLY, * PARISH OF EAST FELICIANA
L. C. BIBBINS, ROBERT *
SMITH, & CLEVELAND McKINZIE * STATE OF LOUISIANA

* *

The transcript of the testimony of the above styled case taken in open court at the court house of East Feliciana Parish, Clinton, Louisiana, beginning at 2:00 o'clock P.M., March 25, 1964, and 10:00 o'clock A.M., April 9, 1964. Honorable John R. Rarick, Judge, presiding.

Erma Parden

COURT REPORTER

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APPEARANCES:

RICHARD KILBOURNE, ESQ., District Attorney, 20th Judicial District, Clinton, Louisiana.	*	For plaintiff
MURPHY W. BELL, ESQ., 971 South 13th Street, Baton Rouge, Louisiana.	*	Defendants
LOLIS E. ELIE, ESQ., 2211 Dryades Street, New Orleans, Louisiana.	*	Defendants, on March 25, 1964
ROBERT F. COLLINS, ESQ., 2211 Dryades Street, New Orleans, Louisiana.	*	Defendants on April 9, 1964

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COURT CALLED TO ORDER AT 2:00 P.M.,
MARCH 25, 1964.

BY MR. BELL: Taking up the preliminary motions in this State of Louisiana vs Henry Brown, etc., #B-4420, if it please the Court, we would like to take up the Application for a Bill of Particulars first. Mr. Kilbourne has filed an Answer to this Application in which he answers the first 5 particulars. He failed to answer #6 and #7, and that is the bone of contention on which we are proceeding today, Your Honor, whether or not the District Attorney should be compelled to answer particularly #6 and #7 in order that these defendants may be able to properly plea to the Bill of Information filed herein. The article #6 reads, "Does the State contend that the mere presence of the defendants in the Audubon Library Building violate the R. S. 14, 103.1?" As Your Honor knows, this particular Statute was enacted by the State Legislature in 1960 pursuant to the demonstrations that have been going on in this Court, and our Legislature enacted this in order to be better able to deal with this type of conduct on the part of individuals who were protesting violation of their civil rights. However, this article is a rather lengthy article and as we have alleged in the Motion to Quash, rather vague; and we are asking under these 2 articles #6 and #7, what type of conduct -- we want to know what did these persons do that made them liable to a Bill or charge being filed against them by the State of Louisiana that claimed disturbance of the peace. We are asking: "Is the mere presence of these defendants in the building the cause of the violation?"

Then we are asking in #7 in order to determine what type of disturbance this is: "Does the State contend that the public is not generally invited to use the facilities and the books of the Audubon Library Building in the Town of Clinton?" I would like to know this so we will know what type of criminal conduct these persons performed when they allegedly entered the Audubon Library Building in the Town of Clinton on that particular day. In order to determine how to apply 14, 103.1, we would like for the State to exhibit a position on whether or not the public is generally invited to use this building; or whether or not, being the State has contended that the very fact that these 4 or 5 defendants, when they entered the building, their mere entering and presence violated the provision of this Statute. However, there are other provisions of this Statute which we are attacking in the Motion to Quash, but in order to be better able to plead and to argue whatever other pleadings we have to file, we think that the State in all earnestness and fairness, in order that these defendants may be able to ascertain what type of standards that the State has applied in order to make certain conduct criminal, we think that article #6 and #7 of that particular Bill of Particulars should be answered, in order that these people may be informed of what type of conduct the State has considered criminal on behalf of the public in a situation such as this.

BY MR. KILBOURNE: Your Honor, I don't see how the Bill of Information could be any more explicit than it is. It says that the defendants did this: "The intent to provoke a breach of the peace, and under circumstances such as the breaching of the peace might be occasioned thereby, they congregated together in the Audubon Library Building in the Town of Clinton, and they refused to leave when ordered to do so by Mrs. Perkins, who is in charge, and also refused to leave when ordered to do so by the Sheriff." That's what they are charged with. In paragraph #5 and #6 where the State contends that the mere presence of the defendants violated the Statute, that's irrelevant, Judge. We contend what we stated in the Bill of Information, that's what we contend they did, and that's what we contend was a violation of the Statute. "Does the State contend that the public is not generally invited to use the facilities?" What does that have to do with it? We don't make any contention at all about that, we just contend what we stated in the Information.

BY MR. BELL: Your Honor, I imagine we can argue it further, but we will submit the application. Your Honor, co-counsel has suggested that maybe instead of your ruling on this application for a Bill of Particulars, you rule on the Motion to Quash and maybe that would dispose of the entire matter because they are pretty close akin, if Mr. Kilbourne wouldn't object to that.

BY MR. ELIE: If Your Honor please, the Bill of Information in this matter is very closely akin to a similar bill that was filed in the matter, State of Louisiana vs Jerome Smith, et al. That case is to be found in 146 So. 2nd, page 152. I was one of the attorneys in this matter, and we made the same argument, some members of the Congress of Racial Equality were picketing in New Orleans. The police officers told them that they could not picket in the place that they wanted to picket, and of course they were arrested and charged under 14, 103.1. The trial judge found them guilty as charged. We appealed this matter to the State Supreme Court, and the case was reversed. The Supreme Court stated in effect through Judge Fournet that it wasn't sufficient to retract the language of the Statute; but that a defendant had a right to know specifically what he was charged with. Now, to say that a person performs an act and that a breach of the peace may be occasioned thereby, this is no standard whatever. Any police officer can make a contention right at this minute that my argument here is such that a breach of the peace may be occasioned and thereby arrest me. This is anti-justice. State of Louisiana vs Smith was the latest pronouncement of the State Supreme Court, but taking it a step further, we find one case in particular involved -- I would like to give the Court this citation, the Town of Ponchatoula vs Bates, that's at 173 La. 823, 138 So. 851. The Supreme Court of Louisiana in that instance says: "The mere fact that persons participated in conduct that tends to disturb a community, intellectual unrest so to speak, if the conduct is such that the people of the community don't agree with what they are doing, this is not sufficient to sustain a charge of disturbing the peace." More closely allied with this case is State vs Sanford, which is in 14 So. 2nd, 778. In this case some 30 Jehova's witnesses went into the Town of Shreveport and they were very unpopular, they weren't wanted there; and they went in and gave out literature and they were picked up and they were first told to stop distributing this literature. They refused to do so, and again, they were arrested, prosecuted. Our own State Supreme Court held that this did not make peaceful conduct criminal simply because you don't agree with them. Going a step further, we have several cases that are nearly on all fours with this case, another Shreveport case. This case is in 82 Supreme Court, 1188. In that case a group of Negroes who were members of the Congress of Racial Equality went into the bus depot, and they went into the section that was traditionally the white section -- this was subsequent to the ICC ruling -- and they were arrested for going and sitting in the white side of that bus depot, and they were told by the police officers to leave. They said they had a right to be there, and indeed they did have a right. "If you don't leave we are going to arrest you," so they arrested them. They were convicted in the lower court, and the State Supreme Court denied writs without any reasons, and the U. S. Supreme Court on a procurium without hearing any arguments said that the mere fact that you didn't want these people in this facility, this isn't a crime. I suggest to Your Honor that the only way that this 14, 103.1 can be constitutional, if it applies to loud and boisterous conduct. I submit to the Court that you can make anything a crime. I can walk out of this courtroom, and any police officer can decide that my walking out of this courtroom tends to cause a breach of the peace, and arrest me. There is no standard in this Statute, whatsoever, so this is why we say in the language of this Statute it's insufficient to inform the defendants of the nature of the charge against them, number one. Number two, that this is very obviously an unconstitutional application of this Statute, and it has been decided by our own State Supreme Court and by the U. S. Supreme Court on each occasion that these type of matters have been before the Court.

BY MR. KILBOURNE: If Your Honor please, I am not familiar with the decisions that counsel has cited, and of course, I didn't know before the argument came up what authority he was relying on; but the State contends in any instance a person can do a lawful thing in such a way as to disturb the public. Counsel could indeed walk out of here in such a way as to disturb the public, for instance if he were carrying a loaded gun, or something of that kind. True, there is no law against a man carrying a gun, he has a right to do that, but he can do that in such a manner that it would disturb the public. It's a very simple thing, and the State only contends that they went in to the Library for the specific purpose of creating a breach of the peace. It's entirely different from them going in there for some lawful purpose, for instance, to get a book or something of that nature. If the State can prove as it is alleged in the Information that they went in there for the specific purpose of creating a disturbance in the Library, and in such a manner that it created a disturbance; and if it was foreseeable, and they foresaw that, if the State can prove that, as alleged in the Information, they are certainly guilty of violating the Statute. It is further alleged that they refused to leave when they were ordered to do so. You could come right in here in this courtroom and create a disturbance in the same manner. You get 5 or 6 people to walk in here and more or less take over your courtroom, and they are ordered out and they refuse to leave, regardless of the fact that they might be guilty of contempt of court, they would also be guilty of disturbing the peace, under this Statute, and that's what the State is contending.

BY MR. ELIE: If Your Honor please, I am certainly willing to admit that it is possible for someone to perform an act that would disturb the peace, there is no question about this. The question, and the only question before this Court, is whether or not Negroes going to a public library, in the absence of loud and boisterous conduct, can be construed as a crime. This is the only issue before the Court, not whether I walk out of here with a loaded gun, but if I walk out of here just as I am with my brief-case, that is the issue before the Court. There isn't anything here to suggest any loud or boisterous conduct, there is nothing to suggest that it was their intent to disturb the peace, that just isn't before the Court, Your Honor.

BY THE COURT: I believe that's what is in the Indictment, to disturb the peace, that would be an intent to provoke a breach of the peace.

BY MR. ELIE: I submit the matter.

BY THE COURT: We all agree, of course, that people can do a lot of things that are normally lawful, and if they intend to do a lawful act in a manner to cause it to be unlawful, for example, to walk in the Library with our clothes off, it would be a lawful act as far as we were able to go in there, but we would certainly be disturbing the peace. It wouldn't be any act, I mean as far as any violence or any noise, to walk in there and start tearing the pages out of the books, and say you have a lawful act and freedom of expression to tear out the pages that you didn't like because of what was said in the book. I guess there is a point of no return; however, I don't think your argument applies in this one, inasmuch as the Act goes further with the suggestion that they did have a right to be there, and it says that they went over with the intent to cause a breach of the peace.

BY MR. ELIE: We submit the matter on the Application for a Bill of Particulars and on the Motion to Quash.

BY THE COURT: The Court notes that in response to the Application for a Bill of Particulars filed by the defendants, the State has filed a Bill and Answer to all paragraphs except #6 and #7. Not having made any cursory examination of the cases that were cited, and inasmuch as the Indictment certainly tracks the language of the Statute itself, the Court feels that the information filed herein along with the Bill of Particulars certainly adequately apprises the defendants, and therefore the Court finds no merit in ordering the State to answer questions #6 and #7, and will deny the same.

BY MR. BELL: To which ruling of the Court we respectfully except, and ask that a formal Bill of Exceptions be reserved, making a part of the Bill, the Application for the Bill of Particulars, the Answer of the District Attorney, and the ruling of the Court all a part of the formal bill.

BY THE COURT: The Motion to Quash again relates back to the sufficiency of the phraseology of the Bill itself, and further the Plea of Unconstitutionality. We must remember the argument we had didn't cover the rights under the State and Federal Constitution, and the Laws of the United States. The Court feels that justice can best be served in this case by hearing the facts, and the Court will deny the Motion to Quash.

√ BY MR. ELIE: To which ruling counsel respectfully reserves a Bill of Exceptions, making the Motion, the ruling of the Court a part thereof.

BY THE COURT: You may proceed.

BY MR. KILBOURNE: The State calls Miriam Feingold.

THE WITNESS, MIRIAM FEINGOLD, AFTER FIRST HAVING BEEN DULY SWORN TO TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP HER GOD, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. KILBOURNE:

Q State your name for the record, and spell it, please?

A Miriam Feingold.

Q What is your residence?

A Clinton, Louisiana.

Q How long have you been a resident of Clinton?

A Since August of 1963.

Q What was your residence before that?

A New York City.

Q Your address?

A 64 Sterling Street, Brooklyn, New York.

Q Under what circumstances did you come to Clinton, Louisiana?

A I came as a task-force --

BY MR. BELL: If it would please the Court, I would like to interpose an objection here that it is irrelevant and immaterial and has nothing to do with this particular case what circumstances she came here under. I think the question here is whether or not these 5 defendants were guilty of disturbing the peace by entering the Audubon Library, and I think that's irrelevant and immaterial to the issue in this case.

BY THE COURT: What is your offering to prove?

BY MR. KILBOURNE: If Your Honor please, I am merely laying the foundation for further examination of the witness. I don't think I should be required to ask my questions in any particular order.

BY THE COURT: The Court overrules the objection, proceed.

BY MR. BELL: We would like to reserve a Bill of Exceptions, making the question, the objection, and the ruling of the Court all a part of a formal Bill.

Q Will you answer the question?

A I came as a task-force worker for the Congress of Racial Equality.

Q Where do you live in Clinton, what is your address in Clinton?

A At the home of Mrs. Josephine Holmes.

Q What is your race?

A I am Caucasian.

Q You are the only Caucasian residing at that residence at this time?

A Yes, I am.

Q The owner of the residence is a colored woman, a Negro?

A Yes, she is.

Q Are you a task-force worker for the Congress of Racial Equality at this time?

A Yes, I am.

Q Under whose supervision are you, and control, if anyone?

A We work under the supervision of Ronnie Moore.

Q Do you know the defendants here today?

A Yes, I do.

Q All of them?

A Yes.

Q How long have you known them?

A I couldn't say.

Q Approximately how long?

A Many months.

Q Have you known all of them many months?

A Some of them longer than others.

Q Let's take Henry Brown, how long have you known Henry Brown?

A I really couldn't say, I have known him a long time.

Q Have you known him since August of 1963?

A I really can't remember.

Q Can you say about how long?

A Well, I would say many months, that's about all I could say about it.

Q * Is he a member of the Congress of Racial Equality? Of the Clinton Branch?

A I refuse to answer that question on the grounds of the First, Fifth, and Fourteenth Amendments of the Constitution of the United States.

BY MR. KILBOURNE: Your Honor, will you ask this witness to answer my question?

BY THE COURT: The Constitution doesn't apply to you because you are not a defendant, and I don't believe it will incriminate you if you know if he is, or isn't.

BY MISS FEINGOLD: I believe I pleaded the First, Fifth and Fourteenth Amendments of the Constitution of the United States.

BY THE COURT: Do you urge your question?

BY MR. KILBOURNE: I do, Your Honor.

BY MR. ELIE: Did the Court say that it was granting the witness immunity from prosecution if she answers the question?

BY THE COURT: She is asking for immunity from identifying one of the other parties.

BY MR. ELIE: She is saying, as I understood it, Your Honor, that by identifying another party here would tend to incriminate her.

BY THE COURT: Her, but she has already said that she is a member of CORE.

BY MR. ELIE: If Your Honor please, once any link in the chain of evidence -- if she answers this question, she doesn't know where it will lead to, and I think she has a right to refuse to answer if she feels that this will tend to incriminate her; and the Court, of course, can grant her immunity, then she has to testify.

BY MR. KILBOURNE: If Your Honor please, I am not sure that I understand what the contention here is. Is she talking about her constitutional rights, or is she talking about someone else's constitutional rights?

BY THE COURT: She feels that she might incriminate herself.

BY MR. KILBOURNE: If Your Honor please, I think counsel is as well aware as I am that a witness's testimony in a criminal trial cannot be used against her.

BY MR. ELIE: I am also well aware, Your Honor, that there is a Statute of the State of Louisiana that if a witness refused to testify, then except for perjury, the Court can grant the witness immunity, because although the testimony may not be used against the person, the District Attorney has his knowledge that he can use to bring the charge against the person. This is the reason for the existence of the Statute.

BY THE COURT: Which Statute are you referring to?

BY MR. ELIE: We don't have the Code of Criminal Procedure with us. I know the Statute exists.

BY MR. KILBOURNE: Your Honor, what I can't understand is how the question I asked her, whether Henry Brown was a member of the Congress of Racial Equality, could incriminate this witness.

BY MR. ELIE: The witness is no lawyer, Judge.

BY THE COURT: Do you re-urge your question?

BY MR. KILBOURNE: Yes, Your Honor, I do.

BY THE COURT: I will have to ask you to answer the question for the District Attorney. I can't see how it can possibly incriminate you.

BY MR. BELL: Judge, is there any way we can object to the question on the grounds that it's irrelevant and immaterial? Whether this man is a member of CORE really has nothing to do with the crime with which he is charged by the State. That's beside the issue and we are really getting tied up on a question that is immaterial and irrelevant, that's what I think the main objection to the question is. However, as co-counsel has said, if the Court will grant the witness immunity from anything that she might say would be used against her, I feel all objection would be removed to the question. I don't see why the witness should be compelled to answer a question when she certainly would not be given the protection of the Court, that at least her answer might not be used against her. I know for a fact that she has already answered questions under the interrogation of the District Attorney, that may well be used against her, but I feel that the Court should grant the immunity to protect her from any further incrimination by the question, especially when we feel that the question is irrelevant and immaterial to the issue at hand.

BY THE COURT: It staggers my imagination to see how anything that she has answered today could incriminate her. I am going to ask you to answer the question of Mr. Kilbourne.

BY MR. ELIE: Your Honor, is the Court presently ordering the witness to answer the question?

BY THE COURT: Yes.

BY MR. ELIE: We would then like to respectfully reserve a Bill to the Court ordering the witness to answer the question without first granting the witness immunity. With the Court's permission we would like to instruct the witness to answer the question.

BY THE COURT: Let the minutes so show.

A Would you repeat the question, please?

THE REPORTER READ THE QUESTION.

A Yes, he is.

Q Do you know whether or not Willie Kelley is a member of the Congress of Racial Equality?

A No, I don't know.

Q Do you know whether L. C. Bibbins is a member of CORE?

A No, I don't know.

Q Robert Smith?

A I don't know.

Q Do you know Robert Smith?

A Yes, I do.

Q Point him out, please?

A He is sitting right there (indicating).

BY MR. KILBOURNE: Is your name Robert Smith?

BY ROBERT SMITH: Yes, sir.

Q How about Cleveland McKinzie, is he a member of the Congress of Racial Equality?

A No, I do not.

Q Do you know where Henry Brown resides? Do you know what Parish he resides in?

A East Feliciana Parish.

Q Where does Willie Kelly reside?

A What do you mean?

Q What Parish does he reside in?

A West Feliciana Parish.

Q What Parish does L. C. Bibbins reside in?

A West Feliciana Parish.

Q What Parish does Robert Smith reside in?

A West Feliciana Parish.

Q What Parish does Cleveland McKinzie reside in?

A West Feliciana.

Q Do you know when and by whom the visit of these 5 defendants to the Audubon Library was planned?

BY MR. ELIE: Objection, there is no testimony to show that it was planned, Your Honor, no sufficient predicate has been laid for this question.

BY THE COURT: Will the District Attorney lay a little more foundation?

Q Do you know whether or not this visit to the Audubon Library by these 5 defendants was planned in advance?

A Would you please specify what you mean by "planned in advance?"

Q Yes, I will try to be a little more specific on that. I will put it this way: Was that one of the projects of the Congress of Racial Equality in this community, to have these men or other Negroes go to the Audubon Library?

BY MR. BELL: Your Honor, of course I have to object to that on the grounds that I think that is irrelevant and immaterial. I think these people are charged with disturbing the peace under 14, 103.1, and its no charge of criminal conspiracy here at all; in the presence of a plan that would indicate a conspiracy. That's what I think the District Attorney is getting at now, he is attempting to prove a conspiracy, and no conspiracy has been alleged, neither has it been charged, just a blanket indictment for disturbing the peace. I think if the witness would answer a question like that, it certainly would indicate that she is testifying to a conspiracy, and that would involve a lot of other people besides these defendants.

BY THE COURT: Do you want to be heard on it?

BY MR. KILBOURNE: Yes, Your Honor,

I believe I alleged that they went there with the intent to provoke a disturbance of the peace, that's all I am getting at. Of course, every crime that has more than one defendant involves also the crime of conspiracy. That doesn't necessarily mean that they have to be charged, but they could be charged, I will certainly admit that. I think the State is obliged to try to prove what the intent was to which these defendants went to the Library.

BY THE COURT: The Court will overrule the objection.

BY MR. BELL: I would like to reserve a Bill of Exceptions, Your Honor, making the question, the objection, and argument of counsel all a part of the formal Bill of Exceptions.

Q Will you read the question?

THE REPORTER READ THE QUESTION.

A I never did hear an announcement to this business about whether or not I would be immune, and until I do, I refuse to answer that question on the grounds of the First, the Fifth, and Fourteenth Amendments to the Constitution of the United States.

BY MR. KILBOURNE: Your Honor, I ask that this witness be instructed to answer the question.

BY THE COURT: Mr. Kilbourne, I can see this possibility that she -- and still again, I don't know, you are calling her as your own witness, and I think she might be immune.

BY MR. KILBOURNE: Well, the only thing about it, Your Honor, she is talking about granting her immunity, and I am sure Your Honor, and counsel will agree that except in very exceptional cases no one has the right to grant the witness immunity.

BY THE COURT: I think under some of our prevailing cases today the easiest way to get immunity to to get into Court and testify, and then you have got immunity.

BY MR. ELIE: Of course, Your Honor, I think in this instance the Court has suggested that the witness has immunity, and the District Attorney in a roundabout way, I suppose, has suggested the same thing, and we say the Court can resolve this pretty easily. The Court admits that here is an instance where the witness by answering this question may tend to incriminate herself. There are cases in which the Court has granted immunity -- as a matter of fact, in many instances that's the only way the Court can get information about the underworld, that's possibly the best example of granting immunity, before a Congressional Committee.

BY THE COURT: Do you have any argument before I rule?

BY MR. KILBOURNE: I have no further argument.

BY THE COURT: In this case the Court will sustain the refusal to testify on the grounds that it might incriminate her.

Q Were there other attempts to enter other branches of the Audubon Library on the same date as this attempt to enter the Audubon Branch Library?

BY MR. BELL: Your Honor, I hate to keep objecting, but the Bill of Information reads that: "on the 7th day of March, 1964, these named defendants, with the intent to provoke a breach of the peace, and under circumstances such a breach of the peace might be occasioned, thereby congregated together in the Audubon Library Building in the Town of Clinton, Louisiana, and did then and there fail and refuse to leave said premises when ordered to do so by Mrs. Marshall Perkins, who then and there in lawful charge of the said premises; and then and there further failed and refused to leave when ordered to do so by Sheriff Doughty." It appears to me that that's all we have to do -- I am not trying to dictate to the State how to prove their case, but we haven't gotten on any of this evidence yet. We are talking about integrating other libraries and other places, and we haven't gotten on the points of this case. I submit that anything else other than proving that the persons here occasioned a breach of the peace over here in the Town of Clinton -- that's relevant and material, anything else is irrelevant and immaterial. It might have some vague connection, and it might show a conspiracy, but no conspiracy has been charged, and that's all we are on now, conspiracy.

BY MR. KILBOURNE: Your Honor, we still get back to the question of the intent with which the defendants went into the library. If they/were in concert with others -- I haven't mentioned the word "integrate", but I see that counsel has, so we will talk about whether they specifically intended to integrate the library. If the evidence will show that that was a concerted action by these defendants, and it may very well be a conspiracy, but that's up to me whether I want to charge them with that or not, I could have already charged them; but what I am getting at is this, if the evidence will show that these defendants and others with them acted in concert to what they say, "integrate the library," then we are getting down to the question of intent, because when you start talking about integrating something, you can easily be talking about provoking a disturbance of the peace, and it is common knowledge that that's what it has done all over the United States.

BY MR. BELL: I wasn't aware that I had used the word, "integrate," but if I have, I certainly wouldn't mind if the State would concede that the library is segregated, then it would cut some of the crust away from this thing and really get to the issue of the case. If we want to make that concession and concede that the Audubon Regional Library is segregated according to race, that Negroes are excluded, then we might be able to really get down and see what the situation really is.

BY MR. KILBOURNE: Your Honor, I realize that we haven't started getting to the facts of the case, and it looks like we might be a long time doing it, but I am going to have to try to persist in doing it to show the intent.

BY THE COURT: The Court will overrule the objection.

BY MR. BELL: To which ruling of the Court we respectfully except, and ask that a formal Bill be reserved, making the question, the answer and argument of counsel to be a part of the formal Bill.

BY MR. KILBOURNE: Will you read the question now?

THE REPORTER READ THE QUESTION.

A For the same reasons that have been stated before, I refuse to answer that question on the grounds of the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

BY MR. KILBOURNE: Your Honor, I certainly ask that the witness be instructed to answer the question.

BY MR. ELIE: Your Honor, we object to the same thing. I think it's becoming more and more obvious why it becomes necessary to grant witnesses immunity. It is impossible for the witness to know just what questions she may answer that will tend to incriminate her. This is the third question that she has refused to answer on her constitutional grounds, and the Court found that in one instance she was correct --

BY THE COURT: I didn't say she was correct, I said I would have to go along with her.

BY MR. ELIE: The Court sustained the objection of counsel which means that every time the question is raised, the Court is then and there ruled that it will not tend to incriminate the witness. I think it would make for a much smoother hearing if the Court granted immunity.

BY THE COURT: The Court can not, and will not grant anyone immunity. Immunity is for a special group of people under special circumstances, and certainly I can't see that the witness fits that. I think in this case that the question and the answer very definitely could not incriminate her. Really the question is based so that it has no right to hurt.

BY MR. BELL: With all due respect to the Court, I think the question asked whether or not other attempts were made to go to other buildings, other than the Audubon Regional Library here -- what it appears to me, with all due fairness to the Court, the question presupposes that this witness has some peculiar knowledge that a plan existed that involved Negroes, or other parties, going to all 3 buildings, as suggested by the District Attorney, simultaneously. It presupposes that she has knowledge of the plan, without any plan being charged in the Bill of Indictment, and persons have already been arrested for criminal conduct involving one of these libraries. Apparently the State is trying to elicit information that presupposes the existence of a conspiracy to violate the Law, as written by our Legislature. It appears to me that certainly if this witness has any specialized knowledge, she would be subjecting herself and others to criminal charges on which she has already invoked the Fifth Amendment, which she has a right to do under the Constitution of this country, and I don't think there should be any doubt that she has a right to refuse to answer any questions, based on the grounds that it might tend to incriminate her. I think it is quite obvious from the quest itself that the question presupposes the existence of a criminal conspiracy. If the conduct on which these persons have been charged is deemed to be permanent, which it has been by the State.

BY THE COURT: Do you re-urge your question?

BY MR. KILBOURNE: I do, Your Honor.

BY THE COURT: I will ask you to answer the question if you know the answer.

BY MR. BELL: If the Honorable Judge orders the witness to answer the question over the objection of counsel, and over the interjection of the Fifth Amendment plea by the witness, we would like to respectfully urge a Bill of Exception, making the question as propounded by the District Attorney, the answer of the witness, the objection and argument of counsel along with the ruling of the Court, all a part of the formal Bill of Exception.

A I would like for permission to speak with my counsel.

BY THE COURT: Mr. Kilbourne, do you have any objection to the witness talking to her attorney?

BY MR. KILBOURNE: No, Your Honor. By now, Your Honor, I think it must be evident to everyone and certainly to the Court that this witness is a hostile witness, and from here on I would ask permission of the Court to ask her leading questions. I don't have any objection for a recess while she confers with her counsel.

BY THE COURT: Sheriff, let's take a 10 minute recess.

10 MINUTE RECESS.

COURT CONVENED.

BY MR. KILBOURNE: I would like, Your Honor, for the record to show who the witness's lawyers are.

BY MR. BELL: Your Honor, I don't think it's proper to let the record show who the witness conferred with as her counsel, I don't see where it has any bearing on the case, whatever; it might tend to cloud the situation a little bit, but I don't see where it has any bearing at all on the case.

BY THE COURT: Well, I left the court room, and I don't know.

BY THE COURT:

Q You are not ashamed to say who your lawyers are, are you?

A Well, I have to agree with counsel saying that as a witness, I don't technically have lawyers that I conferred with. If they were asked if they wanted their names put in the record, I guess its up to them to say whether they want to have their names in or not.

BY MR. KILBOURNE: Your Honor, the State is alleging that this witness is a hostile witness, and I think the record should show that she asked permission to confer with her lawyers, and I think the record should show that her lawyers are also the attorneys for these defendants.

BY MR. ELIE: Your Honor, Mr. Kilbourne has repeated that this is a hostile witness, I don't believe there is any evidence to indicate that she is a hostile witness; all she says, the questions that she thinks will incriminate her, she refuses to answer. This is not because she is maybe a hostile witness.

BY THE COURT: Well, of course, ethically there may even be a conflict of interest here. I think the record now properly shows who the lawyers are; I think, in fact, that the only lawyers in the court room at this time are the District Attorney and two lawyers for the defendants.

BY MR. BELL: Well, I don't want to make an issue of it. Its just that I thought, Your Honor, that the fact that we are representing the 5 defendants in the case, and we got the first witness, then to have it go into the record that the witness is our client, without anything else to show that -- if the District Attorney wants to pursue the fact that this witness is hostile, and wants to cross-examine her, or something like that, it might be pertinent to prove that fact; but I think until I take the stand, or the witness testifies as to our client-attorney relationship, I don't think its proper for the record, just on the motion of the District Attorney, to show that we are defending her, because this witness has never been charged with anything, and she doesn't have a lawyer in this matter. She conferred with us, that is true, and I am going to admit that, but I think the mere fact that she conferred with us on a matter that may be referring to her, should not warrant the insertion in this record of the fact that we also represent the witness in this case, unless there is some point in the District

Attorney's trying to prove something.

BY MR. KILBOURNE: If Your Honor please, the witness has refused to answer a question, and when the Court ordered her to answer it, she asked that she be allowed to confer with her attorneys, and the Court granted her a 10-minute recess for her to be able to confer with her attorneys. The record already shows that, that's already in the record, and I merely want the record to show who it was that she conferred with.

BY THE COURT: I think the record shows that.

BY MR. KILBOURNE: I guess it does.

BY THE COURT: Are you satisfied?

BY MR. KILBOURNE: Well, I guess so.

BY THE COURT: We don't know if the attorneys represent her, or if she retained them, but she conferred with them, and that was what the Court granted a recess for.

BY MR. KILBOURNE: All right, Your Honor, that's all right. I just ask now that she answer the question.

A Would you repeat the question?

THE REPORTER READ THE QUESTION.

A Could you tell me what you mean by, "other branches?"

Q Yes, the branch at St. Francisville, and the branch at

St. Helena.

A Are you asking me if there were other attempts to enter them?

Q The same date as the offense charged against these defendants?

A Yes, there were.

Q Was that by members of the Congress of Racial Equality?

A Well, I am going to refuse to answer that for the same reasons I stated before.

BY MR. KILBOURNE: I ask that the witness be instructed to answer the question, Your Honor.

BY THE COURT: The Court will so order you to answer the question if you know that they are members.

BY MR. BELL: Of course, Your Honor, I want to interpose an objection on that on the grounds that the question as to what organization the persons who attempted to enter other branches of the Audubon Regional Library besides the Clinton Branch, is irrelevant and immaterial.

BY THE COURT: The Court will overrule the objection.

BY MR. BELL: I would like to reserve a formal Bill of Exceptions, making the question, the objection of counsel, and the ruling of the Court all part of the formal Bill of Exceptions. We would also like to except to the Court instructing the witness to answer that question, as the witness has interposed the Fifth Amendment.

BY MR. KILBOURNE: I would like to ask the Court to ask counsel if he is making that objection as counsel for the witness, or as counsel for the defendants.

BY THE COURT: I believe the witness has a personal right to that, and she has invoked the Fifth Amendment; the Court gives no weight to it.

BY MR. BELL: I will withdraw the objection to the ruling of the Court requiring the witness to answer. I think the objection and the interposition of the Fifth Amendment by the witness is sufficient on the record to take care of itself.

THE REPORTER READ THE QUESTION.

A I don't know.

Q Since you objected to answering that question, since you didn't know whether they were or not, why didn't you answer it in the first place?

BY MR. ELIE: If Your Honor please, he has his answer and now he isn't satisfied with the answer, I don't think he can argue with the witness.

BY THE COURT: I think the question is argumentative, Mr. Kilbourne.

BY MR. KILBOURNE: Your Honor, I still want the record to show that the witness is hostile.

BY THE COURT: Do you re-urge the question?

BY MR. KILBOURNE: I do re-urge the question.

BY THE COURT: Subject to the objection, will you answer the question.

BY MR. ELIE: Your Honor, I respectfully reserve a Bill making the request and the Court's ruling to the objection a part thereof.

A What is the question again?

Q Since you have answered that you did not know whether the people who entered the other branches were members of the Congress of Racial Equality, why in the first place, did you object to answering the question?

A Well, I stated my objection that I was pleading the First, Fifth, and Fourteenth Amendment to the Constitution of the United States, and I believe there were also objections raised by counsel for the defendants.

Q Isn't it a fact that you just didn't want to answer my questions, isn't that it?

A (No answer.)

Q Isn't that the real reason?

A I don't understand that question.

Q What is it that you don't understand about it?

A What do you mean, that I don't want to answer it?

Q Did you object to answering that question simply because you don't want to answer the question asked you by the prosecuting attorney in this case?

A I will state again my reasons for not answering the question, and that statement will stay the same.

Q The part of the program of the Congress of Racial Equality in this community is what is termed, "integration," is that right, "integration of the races?"

A I would like to know what that has to do with the order at hand?

BY MR. KILBOURNE: I ask that the witness be instructed to answer the question, Your Honor.

BY THE COURT: Answer the question if you know.

A Could you be a little more detailed?

BY MR. KILBOURNE: I ask that you instruct the witness to answer the question, Your Honor.

BY THE COURT:

Q Do you understand the question?

A Would you repeat the question?

THE REPORTER READ THE QUESTION.

A The program of CORE in any community is to try to work towards a society in which all persons can finally live up to the potentials that they were born with, and all persons have equal opportunities to the facilities of the community so that they can develop their potentials.

BY THE COURT: Do you want her to answer your question?

BY MR. KILBOURNE: She hasn't answered it, Your Honor, I wanted her to answer the original question.

A Well, I thought that the answer to your question was involved in the answer that I gave.

BY MR. KILBOURNE: Your Honor, the question that I simply asked her was whether the program of CORE in this community was one of integration of the races -- termed "integration of the races?"

A Well, CORE believes as part of CORE's philosophy that the development of potential cannot proceed if people cannot have equal opportunities to develop themselves in a segregated society, and that CORE is dedicated to settle segregation, and work for an integrated society.

BY MR. KILBOURNE: That satisfies me.

Q Did you give an interview, or did you call the newspapers and give them a report in the Morning Advocate on the evening the defendants were arrested?

A I really can't remember.

Q Well, maybe I can refresh your memory a little bit. I would like to read to you from an article in the Sunday Advocate, March 8, 1964: "A spokesman for CORE said earlier that such a demonstration was planned. Mimi Feingold --" are you also known as "Mimi?"

A That's right.

Q -- "Mimi Feingold, a CORE task-force worker, said that similar groups of Negroes had attempted to enter public libraries in St. Francisville, in West Feliciana Parish, and at Greensburg, in St. Helena Parish, but were locked out." Is that a correct statement of what you told a newspaper reporter?

A I didn't say that to a newspaper reporter.

Q Are you quoted erroneously in this newspaper?

A No, I am not.

Q That is a correct statement, then, of what I read to you, what you told someone?

A Yes, it is.

Q Did you further make the statement that: "The three libraries, or branches of the Audubon Regional Library, are operated by the tri-parish board, and reserved for use by whites only?"

A I believe I made a statement similar to that.

Q Where did you get that information?

BY MR. BELL: At this point, Your

Honor, I think we are getting really far afield here. I don't see where she got the information that was quoted in the newspaper is relative to the issue in this case. I would like to interpose an objection on the grounds that it is irrelevant and immaterial, it has nothing to do with the guilt or innocence of the five defendants; as to what this witness has got to say about information related to the character of certain libraries that exist in or out of the Parish.

BY MR. KILBOURNE: Your Honor, I am still trying to get to the intent with which these defendants entered in the library. It has already been characterized in the newspapers by this witness here as a demonstration, and that is the purpose of the question. She said, "it was reserved for use by whites only." I think I should be allowed to find out where she got that information.

BY THE COURT: The Court overrules the objection.

BY MR. BELL: Your Honor, I would like to reserve a Bill, and ask that the question, the answer, argument of counsel, and ruling of the Court all be made a part of the formal Bill.

Q Answer the question.

A Well, I really can't remember because our information comes from many different sources.

Q Do you know of some colored person who has been refused service at the library?

A I know five such persons.

Q Who?

A Five such persons.

Q Who are they?

A The five defendants.

Q Is it your testimony here today that they were refused service at the library on the day they were arrested?

BY MR. BELL: Your Honor, I am going to object to the District Attorney asking that question unless she has personal knowledge, that she was present at the time that these people were arrested, and that she would know whether or not they were refused service, or what happened. Unless it was shown that she was in that neighborhood, in that vicinity and a witness --

BY THE COURT: I think the objection is probably good, but she has already said that she knew the five defendants who were arrested.

BY MR. BELL: What I am saying, Your Honor, I think the evidence in part is hearsay and it is not competent.

BY THE COURT: Suppose you lay a little more foundation, Mr. Kilbourne, and find out if she was in a position to know, and if she got the information through hearsay.

BY MR. KILBOURNE: Your Honor, I asked her the question if she knew someone that had been refused service, and she said she knew five, and before I could pursue the matter any further I was interrupted by an objection.

BY THE COURT: The Court will overrule the objection.

BY MR. BELL: Your Honor, I would like to reserve a formal Bill of Exception and ask that the question, the argument of counsel, and the ruling of the Court all be made a part of the formal Bill.

Q You don't know of your own knowledge of any colored person who was refused service at the library, is that correct?

A That's right.

Q In the article in the newspaper which you stated is substantially correct, you, as a CORE spokesman said: "such a demonstration was planned --" what was meant by "demonstration?"

A Is the CORE spokesman identified?

Q No.

BY MR. ELIE: If Your Honor pleases, since the District Attorney is reading from a newspaper, I am going to have to request that the witness be permitted to see the whole of her statement.

BY MR. KILBOURNE: I will be glad to let the witness see the statement.

A (The witness looked at the statement.)

Q Will you answer the question? Are you denying that you are the spokesman referred to in that newspaper article?

A I really don't know; I couldn't say whether I am or not.

Q Suppose you were the spokesman for that article, will you please tell the Court what you meant by that word, "demonstration?"

BY MR. ELIE: Your Honor, I don't see how she can be considered competent to answer the question.

BY THE COURT: I think the objection is good and I will sustain it.

Q How long have you been a member of CORE?

A I can't remember exactly, for several years.

Q In connection with your work as a member of CORE, haven't you, yourself, engaged in frequent demonstrations?

A I don't see what that question has to do with this case.

BY THE COURT: You don't want to argue with Mr. Kilbourne.

BY MR. KILBOURNE: Your Honor, I ask that the witness be instructed to answer my question.

BY THE COURT: Answer the District Attorney's question.

A Could you define what you mean by "demonstrations?"

Q All right, I ask you this: Were you not arrested in Camden, Maryland, in connection with an attempt to integrate a swimming pool, I think in 1962?

A No, I was not.

Q Where were you arrested?

BY MR. ELIE: Objection, Your Honor, he has not proved that she was ever arrested, and now he is asking where she was arrested. The witness said she has not been arrested, and again he is assuming a fact that has never been proven.

Q Well, I will ask you this: Have you ever been arrested?

BY MR. ELIE: Objection again, Your Honor, is the District Attorney attempting to impeach his own witness; there is no relevancy to this case.

BY MR. KILBOURNE: Your Honor, I am getting around to try to prove what a "demonstration" is now.

BY THE COURT: Why don't you rephrase your question to "convicted?"

Q Have you ever been convicted of taking part in any demonstrations as a member of the Congress of Racial Equality?

A (No answer.)

BY MR. BELL: We hate to state this objection because we don't want to delay proceeding unduly, but is the District Attorney attempting to impeach his witness, that's what we are trying to find out?

BY THE COURT: The District Attorney had earlier asked the Court to recognize the witness as a hostile witness.

BY MR. BELL: Didn't the Court rule on that? That's what we are trying to find out, if she is a hostile witness. I mean, if she has already been ruled a hostile witness, prior convictions have nothing to do with --

BY THE COURT: I believe that Mr. Kilbourne has said that he is trying to get a definition of what a "demonstration" is in CORE lingo. She said she didn't make the statement to the newspapers, so I sustained your objection on that.

BY MR. BELL: Again I submit, Your Honor, that we might get a more reliable source, like a dictionary, or an expert on English, or something. I don't think we can qualify this witness as an expert on the English language.

BY MR. ELIE: Judge, I just cannot see the relevancy of it. The State is trying to prove that a lot of people are attempting to disturb the peace, and whether the witness is convicted for murder, I don't see that it has anything to do with this case, what does it have to do with the attempt? If she committed murder, that has nothing to do with the attempt.

BY THE COURT: Its now 5:00 o'clock, and I can see us either spending the night or coming back.

BY MR. ELIE: I would like to get this over with today if possible, Judge.

BY MR. KILBOURNE: Your Honor, I can see that we are going to be here quite a long time with this witness because every time I try to ask her a question, she pretends that she doesn't even know what a "demonstration" is, and she has been a member of the Congress of Racial Equality for nearly 2 years; so I am going to have to take her over and over until she finally decides to answer these simple questions.

BY THE COURT: Suppose we adjourn until April 9, 1964, at 9:00 A.M.

BY MR. ELIE: Your Honor, I would like to ask the Court if possible, because we have been late for Court on several occasions, to open Court at 10:00 instead of 9:00, as it makes it a little hard to get here from New Orleans for 9:00.

BY THE COURT: Court adjourned until 10:00 A.M., April 9, 1964.

COURT CONVENED AT 10:00 A.M., APRIL 9, 1964.

BY THE COURT: In the case of "State of Louisiana vs Henry Brown, et al," is counsel present?

BY MR. KILBOURNE: Plaintiff is present and ready to proceed.

BY MR. BELL: Defendants are ready, Your Honor, Robert F. Collins, and Murphy Bell are representing the defendants today, Your Honor.

BY MR. KILBOURNE: I wish to call Miriam Feingold to the stand.

BY THE COURT: You have already been sworn, you remain under oath for the remainder of the case.

DIRECT EXAMINATION

BY MR. KILBOURNE:

Q Was there any particular reason for these defendants/to going the Library on a Saturday morning?

A You mean on a Saturday as opposed to any other day?

Q Yes?

A No, I don't.

Q Was there any advance notice given any public officials or law enforcement officials that this entry of the Library by the defendants was going to be made on the day it was made?

BY MR. BELL: We object, Your Honor.

BY MR. COLLINS: This line of questioning presupposes that this witness is the spokesman for, and knows all about what was involved in this particular incident; therefore, we object on the basis that no proper foundation has been laid.

BY THE COURT: I believe the question was, "did she know?"

BY MR. KILBOURNE: I believe the foundation was laid the last time the case was heard at which time this particular counsel wasn't present.

BY THE COURT: The Court overrules the objection.

A No, I don't know of any.

Q Do you know who notified the Federal Bureau of Investigation that this entry was going to be made in the Library?

BY MR. BELL: Your Honor, I don't want to belabor with too many objections, but there is nothing in the record to show that the F. B. I. was notified, so I don't think that is a proper question. If the record would show that the F. B. I. was notified, then this maybe would be an answerable question.

BY MR. KILBOURNE: Your Honor, he is requiring me to put my evidence on in a certain method, and I don't think the State requires me to do that, I don't think it requires it in any particular order.

BY THE COURT: The Court overrules the objection.

A I honestly can't remember who notified them.

Q I take it from your answers that you know that the Federal Bureau of Investigation was notified?

A Well, I can't be sure of that, I really can't remember.

Q Is your answer that you don't know, or that you can't remember?

A I can't remember.

BY MR. KILBOURNE: If Your Honor please, in connection with the witness's testimony, the State wishes to offer, produce and file into evidence page 2-A of the Baton Rouge Sunday Advocate of March 8, 1964, and with particular reference to the article: "Clinton Library sit-in nets 5 arrests," to be identified as "State #1."

BY MR. BELL: Your Honor, of course we are going to object on the ground, first, that it's not relevant; second, that I don't think this particular article is anything more than hearsay, it doesn't identify who wrote it; and third, it just has no relevancy to the guilt or innocence of the accused.

I don't see what this line of questioning is going to do.

BY THE COURT: I think we probably have covered that previously, but since your objection I will reserve a ruling on it until he lays more foundation.

BY MR. BELL: Of course, I would like to further call to the Court's attention the fact that this witness has never identified this particular article --

BY THE COURT: The Court has already ruled. The Court reserves its ruling subject to further foundation by the State.

BY MR. KILBOURNE: If Your Honor please, my recollection is that the witness testified the last time we were in Court that the article was substantially correct, that it was a representation of her interview with a reporter of the Baton Rouge paper.

BY THE COURT: I think substantially that was correct, but since counsel is again objecting, I suggest that you go back and re-lay your foundation on it.

BY MR. KILBOURNE: If Your Honor please, I am satisfied with what is in the record. If I am wrong, the Court can throw it out, but it takes so much time to get this witness to answer a question, I just don't like to waste any more time trying to get her to answer it; I think she has answered it.

BY THE COURT: I reserved a ruling because I thought she had identified the report except for several words in it, and said it was substantially what she had related. I don't know exactly, but according to my notes here -- I am trying to remember what did happen. If the State is satisfied --

BY MR. KILBOURNE: I am satisfied, Your Honor, without belaboring the matter further, and I tender the witness.

BY MR. BELL: We would like to take a Bill of Exceptions, marking part of the Bill of Exception, the State's introduction marked "State #1," and the testimony of the witness, and ask that it all be made a part of the Bill of Exception.

BY THE COURT: You are asking for the testimony previous to this, or the record?

BY MR. BELL: The record, and the statement be made a part of the Bill of

Exception.

BY THE COURT: Let the offering then be received, filed and identified as "State #1."

BY MR. BELL: No questions, Your Honor.

BY MR. KILBOURNE: I call Mrs. Reeves to the stand, please.

THE WITNESS, MRS. KATIE REEVES, AFTER FIRST HAVING BEEN DULY SWORN TO TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP HER GOD, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. KILBOURNE:

Q Will you state your name for the record, please?

A Katie Reeves.

Q K-a-t-i-e?

A Yes.

Q R-e-e-v-e-s?

A Yes.

Q Mrs. Reeves, what is your occupation? I know you are a housewife, but what else do you do?

A I am Branch Assistant at the Audubon Regional Library.

Q In that capacity, what are your duties?

A To assist people who come into the Library to select their books; check out the books to them; to keep the shelves in order, and to keep a record of the circulation of the day.

Q This is a case of the State of Louisiana prosecuting Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith and Cleveland McKinzie for disturbing the peace on the 7th of March, 1964, in regard to an incident at the Library. I first ask you this question: Do you know any of these defendants?

A Only one, Henry Brown.

Q Do you see Henry Brown in Court?

A Yes, right there. (indicating)

Q Stand up please (to Henry Brown.) Is that Henry Brown?

A Yes, sir.

Q Do you know any of the other defendants?

A No, sir, I can't identify any of them.

Q Have you seen any of the other defendants before?

A Not that I know of.

Q Will you relate to the Court what happened on the morning of the 7th of March, which was a Saturday, that resulted in this charge?

A Yes. These 4 came to the Library.

Q How many?

A Four and Henry Brown, 5 altogether. I met them between the tables, and I asked if I could help. He gave me the name of a book that he wanted; I checked the card catalogue to see if we had the book, but we did not have the book, so I told him we would have to ask the State Library for the book, and he would be notified when we received the book from the State, and he could either pick it up or it would be mailed to him, that it would be Monday or Tuesday.

Q What happened then?

A ✓ Since we didnot have the book I had assumed that they would leave, they did not. I repeated what I had said, and then I asked them to leave, they did not; so then I called Mrs. Perkins and she came in and said essentially the same thing, and also asked them to leave.

Q Did they leave?

A No, sir, they did not.

Q What did they say, if anything, or did any of them say anything when they were asked to leave?

A No, sir, I don't think so.

Q Did anyone ask for a book besides Henry Brown?

A No, sir.

Q Will you describe the commotion in the Library when these defendants came in -- just describe it as best you can?

A As you enter the door to the left are bookshelves, a table, and a card catalogue; straight ahead of you is the stove; to your right is a table and bookshelves, and a desk and chair.

Q Does that open on to the street?

A Yes, sir.

Q On to the sidewalk?

A Yes, sir, on to the sidewalk.

Q That building is located where, Mrs. Reeves?

A Across the street from the Court House.

Q That is on the north side of the Court House?

A Yes, sir.

Q ✓ When the defendants were asked to leave, you already testified that they didn't say anything, did they do anything?

A ✓ No, they just sat there, at least Henry Brown sat, the others were standing. He sat down when I went to the card catalogue to check to see if we had the book.

Q About what time of day was it, Mrs. Reeves?

A I would say around 20 minutes to 12:00, at least 11:30 or a quarter to 12:00.

Q Were you alone in the room at the time?

A Yes, sir.

BY MR. KILBOURNE: I tender the witness.

CROSS EXAMINATION

BY MR. BELL:

XQ Mrs. Reeves, what is the name of the book that one of the accused asked for?

A I copied it from the paper he handed me, "Wendall Arna, the Story of the Negro: Bontems."

Q Did he not ask for another book later on?

A I don't think so.

XQ Do you recall one of the accused asking for the Story of the Constitution, a book on the United States Constitution?

A He did not ask me for it.

XQ Were you present when he asked someone else for it?

A He did not exactly ask for it.

XQ There was some conversation regarding the book on the Constitution, is that not correct?

A Yes, sir, he said, "How about the Constitution?"

XQ But he did not ask you that directly?

A He did not ask me.

XQ I think you testified on direct that no one said anything, other than the accused, that is what you were talking about?

A That's right, he was the one doing the talking.

XQ Was there any noise or boisterous talking?

A No.

XQ Everybody was seated?

A Henry Brown was seated, the others were standing.

XQ Can you identify any of the other accused?

A I don't think I can.

XQ The only one you can identify is Henry Brown?

A Yes, Henry Brown.

XQ How many times did you ask all of the accused to leave?

A Twice.

XQ Did you address just Henry Brown, or did you address all 5 of them?

A They were all together, I assumed that I was addressing all of them, I did not call anyone by name.

XQ But you merely directed your words to the person you was talking to, which was Henry Brown, is that correct?

A I was talking to him in connection with the book that he had ordered, my other conversation was in reference to all of them as I did not know any names.

XQ Mrs. Reeves, did you mention anything to Henry Brown about a policy or regulation of the Audubon Regional Library?

A I think I said that his point of service was a bookmobile or it could be mailed to him.

XQ Can you explain that, Mrs. Reeves? What do you mean by, "point of service?"

A He could pick up his book at the bookmobile, or he could have it mailed to him.

XQ By that you meant that he could not be served in the Library itself?

A He could pick it up, yes, he probably would have that day had we had the book.

XQ Did you not mention to him that the rules of the Library prohibited him from being served at this particular point of service?

A I did not.

XQ You did not do that?

A No, I did not.

XQ Did you suggest to him that he could get his book from the bookmobile rather than at this particular Library?

A He could not have gotten this particular book from the bookmobile because we do not have the book for which he asked.

XQ I understand that. And he did not request the book on the Constitution from you so you don't know anything about that?

A No.

XQ Did you ever send this particular book to Henry Brown?

A I did not, when we do not have the book, I take the request on a slip of paper and then I give it to someone else and they check it out; and when it comes in, it is mailed or they are notified.

XQ But you did take this order?

A I did take this order and process it as usual.

XQ Is that the usual procedure, if a person makes a request to you directly, that you would mail the book out to them, or you would have them pick it up; what is the usual procedure?

A That they would pick it up, or we would mail it, either way.

XQ In the absence of any directions, do you usually mail the book, or would you request that they pick it up?

A (No answer.)

XQ The reason I am asking that question, Mrs. Reeves, is because I believe we have a book here that was mailed to Henry Brown from the Audubon Regional Library, and I don't know whether or not this was mailed. I ask you to identify this book and ask you whether this book came through your Library?

A (Witness looked at the book) I cannot say, I do nothing with the book after I take the request until they are handed to me.

XQ Do you remember mailing this card?

A I do not.

XQ Have you seen that card before?

A I have not.

BY MR. BELL: Thank you, Mrs. Reeves.

RE-DIRECT EXAMINATION

BY MR. KILBOURNE:

Q Mrs. Reeves, I wanted to ask you about this book again, what was the title of this book? Before I ask you that, did he hand you a slip of paper with the book written on it?

A Yes, he did.

Q Did he say, "I would like to get this book?"

A He said, "I would like to get this book," and he handed me a slip of paper.

Q What was the name of that book again?

A Wendall Arna.

Q Would you spell that, please, ma'am?

A W-e-n-d-a-l-l.

Q What was the other word?

A A-r-n-a, The Story of the Negro: Bontems.

Q Had you ever heard of that book before?

A I never had.

Q Do you know whether or not there is such a book?

A We did not show it in the card catalogue -- that would be my way of seeing if we owned the book.

Q The card catalogue, what does that show, the books that you actually have in the library, or the ones that are available?

A The ones that are available in this region.

Q When they came in, was the door shut to the Library?

A Yes.

Q Does the Library have a screen-door, and then a wooden-door in front of it?

A Yes.

Q Both of those, the screen-door and the wooden-door was shut?

A Yes.

Q Is that the usual practice?

A Yes, sir, especially if it was cool, or hot if it was hot because the air-conditioners regulate it.

Q It would be your testimony that ordinarily both were closed?

A Yes, ordinarily both were closed.

Q Describe as best you can, how the defendants came in, were they in the same order, were they right together; who came in first?

A I can't say because they all seemed to come in at one time, as a group.

Q They came in as a group?

A Yes, sir.

BY MR. KILBOURNE: If Your Honor please, I would ask that all of the defendants stand up.

THE DEFENDANTS STOOD UP.

Q Can you identify any of them, other than the one you have already identified?

A I don't think so.

BY MR. KILBOURNE: That's all I have, thank you, Mrs. Reeves.

RE-CROSS EXAMINATION

BY MR. BELL:

XQ Mrs. Reeves, you said you have a table in this library with some chairs?

A Two tables.

XQ What are these tables used for?

A Book-display and magazines.

XQ Isn't it the policy of the Library to allow the public to read in the Library if they care to?

A I suppose so, but not many people do.

XQ But they normally would use these tables and chairs to read if they cared to do so quietly?

A I suppose so.

XQ I mean as far as you know, there is no rule against a citizen reading a book in the Library if a citizen cared to? Assuming that the Library had the book a citizen wanted?

A I suppose they would, very few people read; if a book is there and they want it, they take it and go.

XQ What type of books do they have in the Library that's available for the public to take out: I would like to rephrase that question: Do you have any reference books that are not available to a citizen to take from the Library, you have to use it right at the Library?

A Yes.

XQ You have books like that?

A Yes, we do.

XQ Normally, if a person wanted to see one of those books they would have to look at it and get what information they wanted inside the Library?

A I assume you are talking about reference books, we take requests by phone, and we give information citing the source.

BY MR. BELL: Thank you, Mrs. Reeves.

RE-DIRECT EXAMINATION

BY MR. KILBOURNE:

Q Mrs. Reeves, did any of these defendants indicate any desire for any reference book, or anything of that kind?

A No, sir.

Q Did they indicate a desire to read anything in the Library?

A No, sir.

BY MR. KILBOURNE: That's all.

BY THE COURT:

Q Mrs. Reeves, how old is the Library, do you know?

A I really couldn't say definitely, I would think since 1961, but I couldn't say definitely because I don't know.

BY THE COURT: That's all.

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WITNESS EXCUSED

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BY MR. KILBOURNE: I call Mrs. Marshall Perkins.

THE WITNESS, MRS. MARSHALL PERKINS, AFTER FIRST HAVING BEEN DULY SWORN TO TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP HER GOD, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. KILBOURNE:

Q Will you state your name for the record, please?

A Mrs. Marshall Perkins.

Q What is your connection with the Audubon Regional Library?

A I am Regional Librarian.

Q Tell the Court what the Regional Library is? What does it consist of?

A The Audubon Regional Library is a library operated jointly by 2 Parishes, its points of service are 3 branches and 2 bookmobiles.

Q Is there a main Library, or main facility?

A There is no main Library as such, there is a headquarters maintained at Clinton. The headquarters is not located in the branch, it is located behind the branch and is not open to the public.

Q What portion of the headquarters is open to the public?

A The portion that is open to the public is the room in which you enter from the street on the west side, and there is a children's room open to the public, and a small room which maintains magazines. We do not maintain a reading-room, as such, we do not have the space for it.

Q Mrs. Perkins, were you present on the 7th of March, I believe it was, when the incident occurred which resulted in the charges we are prosecuting against the defendants present in the court room today?

A I was not present in the room at the time they entered, no, I was in my office at the time.

Q What first attracted your attention to the situation?

A Mrs. Reeves came in and told me that she had asked the people to leave, and they had not done so.

Q So then what did you do?

A I went out to talk to them myself.

Q Did you know any of them?

A Not before that time, no.

Q Do I understand your answer to be that you had never seen any of the defendants before?

A That's right.

Q To your knowledge had they ever made any requests for any books in the Library before?

A I would not necessarily be in a position to know this, I do not handle all of the books if they can be filled within the Regional; I only answer those requests that we do not own, and I decide whether we will purchase the book, or whether we will try to borrow the book from the State Library, or from L.S.U., or from Tulane.

Q When you went into the -- I will call it for convenience sake the lobby --

A It's the adult reading-room, the adult service-room.

Q You are talking about the same room I call the lobby?

A Yes.

Q When you went into the room, what did you see?

A I saw the 5 people and Mrs. Reeves.

Q What were the 5 people doing?

A One of the 5 people were seated, and the others were standing.

Q What did you say to them, if anything?

A I said that I understood that Mrs. Reeves had asked them to leave, and she had given me the request, and I didn't know whether they had misunderstood about me having taken the request.

Q When you asked them that, did anyone say anything?

A I asked if he had asked for the book before, I believe the question was.

Q Who did you address that to, Mrs. Perkins?

A To Henry Brown.

Q What was his answer?

A He said no, he hadn't. Excuse me, he said he had asked for it at the Blue Bookmobile.

Q Had you ever heard of the book before?

A Not this particular book, no.

Q I understand that the book was sent to Henry Brown?

A That is correct.

Q Was that the book that he asked for?

A We assumed that it was, the report we got from the State Library was that the book that he wanted was a book by Arna Bontemps, which was called, "The Story of the Negro."

Q That wasn't exactly the book that he asked for?

A No, it was not, I have that request if you would like to see it?

Q I would like to see it, please, ma'am.

A This is the way we take them (handing the request to Mr. Kilbourne.)

Q As I understand it, this isn't the one that he gave you?

A No, it isn't, he retained that slip. Usually people who ask for books want their information back.

Q The book that he actually asked for, were you able to locate it at all?

A No, sir.

Q What transpired then after the incident that you have already related?

A What do you mean?

Q Did something come up about the Constitution?

A Yes, something came up about the Constitution, but not what I would call a request.

Q What came up?

A What was said was this: Henry Brown said, "what about the Constitution?" I assumed that he meant did we have it in the Library, on the heels of the other. I said, "we own copies of it, yes," but he did not request the Constitution.

Q Did any of the other defendants say anything to you?

A No, sir.

Q Did they say anything to anyone, did they speak to the best of your recollection?

A I have no recollection of that.

Q Did you ask them to leave?

A Yes, sir.

Q I know you can't remember the exact words, but do you remember what you said to them?

A The gist of it was they had been asked to leave by Mrs. Reeves; Mrs. Reeves is in charge of the Branch, and they did not comply with her request. I also asked them to leave, saying that the one who seemed to want something had been served.

Q What did they do then?

A Nothing.

Q Did they leave?

A No, sir.

Q Did they say anything about them not going to leave?

A I don't think they did at that point.

Q At any time, was anything said to that effect?

A After the Deputies came to the Library, there was something said, yes.

Q What was that?

BY MR. BELL: Your Honor, I don't think the witness can testify to hearsay.

BY MR. KILBOURNE: According to the Res Gestae, Your Honor.

BY THE COURT: Lay a little more foundation.

Q What we are talking about, did it all take place in the Library within a short time, and were these defendants all present?

A Please?

Q You mentioned when the deputies got there, were they still there?

A Oh, yes.

BY MR. BELL: I was trying to find out, Your Honor, if the witness has identified all of the accused. I am not quite sure that she identified all of them.

BY MR. KILBOURNE: Will the 5 defendants stand up again?

THE DEFENDANTS STOOD UP.

Q Can you identify the 5 defendants, Mrs. Perkins?

A You mean, can I identify them by name?

Q I don't suppose you know the name of them?

A I don't, no, sir.

Q You recognized them as being the same people who were over at the Library?

A Yes, I can be sure about the first, the third, the fourth, and the fifth, in order from this end. I cannot be certain about the second.

Q There were 5 colored males there?

A Yes, sir, that is correct.

BY MR. BELL: Your Honor, in view of the fact that she could not identify all 5 of them, I would still submit that the testimony as to hearsay under the Res Gestae

Rule would not be permissable at this point.

BY THE COURT: The Court overrules the objection.

Q What was said by the defendants, or by any of them, during the time the Sheriff or the Deputies were there?

A I think what they said was -- what Henry Brown said was, that he was not going to leave the Library, substantially that was it.

Q Approximately how long had these defendants been there before the arrival at the Library of the Officers?

A I don't really know, it could have been 10 or 15 minutes.

Q Did you call the Sheriff yourself?

A No, I did not.

Q Did someone call from the Library?

A No, sir, I started to, I had asked for a telephone book.

BY MR. KILBOURNE: I tender the witness.

CROSS EXAMINATION

BY MR. COLLINS:

XQ Mrs. Perkins, isn't it a fact that it is Parish policy that Negroes not be served at the Audubon Regional Library?

A That is not correct.

XQ Isn't it a matter of fact that you told the 5 defendants in this case on the occasion on which they were arrested that they could not be served at the Audubon Regional Library?

A They were served.

XQ They were served?

A They were served. Anytime you do not have a book, you cannot give it to the person; you take the request and you do your best to get the person the book, that's the policy at the Audubon Regional.

XQ Isn't it a fact that the defendant, Henry Brown, asked you for a book on the Constitution of the United States?

A He did not ask me for a book on the Constitution of the United States.

XQ Didn't you previously testify that he asked you about the Constitution?

A He said to me, "what about the Constitution?"

XQ To which your reply was?

A That we owned it, that we owned a copy, that we owned several copies.

XQ Isn't it a fact that at that point that you could not serve him from the Library?

A I did not.

XQ You have reference books in this library, isn't that correct, Mrs. Perkins?

A A few.

XQ In order to use these reference books, isn't it a fact that you have to use them on the premises?

A Sometimes we loan out reference books, yes.

XQ Isn't it a fact that you also have tables present in this room that has been referred to variously as a library, as the adult reading room, and by various other names?

A We have tables there, yes.

XQ Isn't it a fact that the tables in the library is used for the reference books, by persons sitting at the tables in this particular room?

A On occasion they have, yes, but not sitting in that particular room, there is only one chair in there.

XQ Where does a person usually sit?

A Where?

XQ Could not an individual who wanted to use the reference books sit in the room on that particular chair that you are talking about, at the table?

A If you are going to use reference sets as such, the information that you are wanting is usually brief, and therefore you could read in reference books like the Encyclopedias, World Almanac, and things like that; and these are factual, brief things, they do not take extensive reading.

XQ Do you have the Encyclopedia Britannica?

A I don't think we have it in the branch here.

XQ Do you have any Encyclopedias in the branch?

A Yes.

XQ Which Encyclopedias do you have?

A I believe we have the Americana here.

XQ Isn't it a fact that if a person wanted to copy information from one of these reference books, they might find it necessary to sit down to take notes from that reference book, and that sort of thing?

A I suppose so.

XQ And I presume that you do provide the facility of the table and chair for that purpose, is that not correct?

A Not necessarily.

XQ In other words, it could be used for that purpose?

A You could stand there at one of the tables and write the information down, but not many people could be accomodated to sit down because there is only one chair, and the bulk of those 2 tables is used for display.

XQ Mrs. Perkins, what 3 Parishes does the Audubon Regional Library cover?

A East Feliciana, St. Helena, and West Feliciana.

XQ Mrs. Perkins, there are branch libraries in each of the 3 Parishes, are there not?

A Yes.

XQ And there are also 2 Bookmobiles, is that correct?

A That's correct.

XQ Isn't it a fact that one serves the Negro residents, and one of these Bookmobiles serves the white residents?

A One of them operates in those areas, yes.

XQ One operates in the Negro area, and one operates in the white area?

A In other words, I don't know whether you realize this or not, but the major portion of our schedule is taken up in serving schools, we serve 33 schools in these 3 Parishes with those Bookmobiles.

XQ I ask that you answer the question. Isn't it a fact that one of these Bookmobiles serve Negro areas, and one serves white areas?

BY MR. KILBOURNE: Your Honor, let me say this, this is cross-examination, I know, but I think we have gone far afield when we get off on Bookmobiles. I think maybe that counsel is now trying a Civil Suit which we filed in the Federal Court, and I don't want to get involved in that this morning; we are only trying this alleged disturbance that took place over at the Audubon Regional Library.

BY MR. COLLINS: Your Honor, the purpose of this cross-examination is to get at the real facts of exactly what's been going on in reference to using this particular Library, regarding the use of this Library and the policy of this Library.

BY THE COURT: Why don't you ask the witness if she knows of any Negroes that have been refused books there?

BY MR. COLLINS: Well, Your Honor, on cross-examination, of course, the witness may not be direct in the answer, sometimes you have to approach it other ways to try to get at the point that you are trying to make.

BY THE COURT: That isn't material

at all, the only case here is Disturbing the Peace. I sustain the State's objection.

XQ At the time of this incident, Mrs. Perkins, do I understand your testimony to be that there was only one chair in this reading room of the library where these people were?

A Other than the desk-chair, yes.

XQ Were there any tables in the room at the time?

A Two.

XQ Two tables and one chair?

A Yes.

XQ And there were open book-shelves in this room?

A That's right.

XQ Was it the policy of the Library to permit patrons of the Library to browse among these books?

A Yes.

XQ Did these defendants have that same privilege as any other citizens?

A They didn't use it, they could have.

XQ Did they have the same privilege as any other citizen?

A Yes.

XQ Do they still have the same privilege of going to this Library and browsing among the books, and requesting service in this Library as any other citizen?

A In what respect?

XQ Do these defendants, and did they at the time of this incident, have the same privilege as any other citizen in using the books of the Audubon Regional Library in Clinton,

Louisiana?

A ✓ Any book in this Library is available to any citizen of this region who is a resident.

XQ And any citizen of this region can come into that Library and sit down there as any other citizen, is that correct?

A Well, not very many can.

XQ We are talking about individual cases.

A A single person could, yes.

XQ And any one of these defendants could, is that correct?

A * If they are registered borrowers of the Library, yes.

XQ Can they also browse around in this Library?

A If they were registered to borrow books, yes.

XQ And in order to register, all you have to do is to go up to the desk and give the Librarian your name?

A You have to fill out a borrowers card.

XQ Fill out a card?

A And it would have to be checked against the other branches of the region to determine if they had a card unless they could produce an I.D. card, an identification card which shows that they are registered by the Audubon Regional Library. In other words, they could not borrow a book on that day.

XQ In other words, its your testimony that there were no racial restrictions, there were none at that time, and there are none now, with reference to the use of any of the facilities of the Audubon Regional Library, is that a fact?

BY MR. KILBOURNE: I object to that,

Your Honor.

BY THE COURT: Sustain the objection.

BY MR. COLLINS: Your Honor, counsel for the defendants respectfully reserves a Bill of Exceptions, making the testimony of the witness, and the question part of the record. Your Honor, I don't think that we can get to the heart of the question.

BY THE COURT: I don't understand what you mean by "heart" of it, but we are not trying a race-case, we are trying a Disturbing the Peace case, a simple little misdemeanor case. Let's not belabor it any more, let's get ahead with the case at hand.

XQ Mrs. Perkins, I show you what purports to be a postcard of the United States Postal Service, postmarked Clinton, March 28, 1964, addressed to Henry Brown, Jackson, Louisiana, which reads as follows: "Memo to Henry Brown from the Audubon Regional Library, Bookmobile #2." "We are mailing to you under separate cover the copy of Arna Bontemps The Story of the Negro. Neither the Audubon or the State Library could verify such a title by Wendall. We hope that this is the book you want. You may return the book either by mail or to the Blue Bookmobile, whichever way is most convenient." Is this card sent by your Audubon Regional Library?

A We sent such a card, yes.

XQ And you can identify this?

A Yes --

BY MR. COLLINS: In connection with the testimony of the witness, I would like to offer, introduce and file in evidence this --

A -- I assume this is the card we sent. We send such notices when the book is not exactly the same title and author as the patron asks, in order to clarify the fact that we are not able to supply such a book -- probably there would be such a book, but neither did the Audubon Regional Library's bibliography file show, nor did the State Library's bibliography file show that they had such a title by Wendall; otherwise, had we found the book by Wendall, we would not have sent the card, we would have sent the book.

BY MR. COLLINS: Your Honor, in connection with the testimony of the witness, I would like to offer, introduce and file into evidence this postcard and ask that it be marked for identification, "Defendants #1."

BY THE COURT: Any objection to the offering? Let it be received, filed in evidence and identified as "Defendants Exhibit #1."

XQ I show you what purports to be a mailing-jacket with the United States postmark on it, addressed to Henry Brown, Jackson, Louisiana, stamped March 29, 1964, which has the notation: "Library material from the Audubon Regional

Library, Clinton, Louisiana," and I ask you if you can identify this as being the kind of wrapper in which you mail books to the patrons of the Library?

A The jacket is not exactly the kind that we mail, we mail just whatever we have. In other words, we cannot afford to buy such material; however, the mailing-label is ours, yes.

XQ Are you in a position to identify this as something that was mailed from the Audubon Library?

A Yes.

XQ I show you a book which is entitled: "The Story of the Negro, by Arna Bontemps," published in New York, 1948, and ask you if you know whether or not this book was sent from the Audubon Regional Library to Henry Brown?

A It was mailed from the Audubon Regional Library,and borrowed from the State Library.

BY MR. COLLINS: In connection with the witness's testimony, I would like to ask that the mailing-jacket of this book be marked for identification, "Defendants #2," and that it be introduced in evidence; and that the book identified as "The Story of the Negro by Arna Bontemps," be marked for identification as "Defendants #3."

BY MR. KILBOURNE: Your Honor, I am going to object to the offering of the book into evidence because the book belongs to the Library, and I don't think there is any necessity for it, somebody might want to read it, the title is there, it speaks for itself.

BY THE COURT: I think this, that we can permit the offering of the book and permit it to be withdrawn and returned to circulation.

BY MR. KILBOURNE: That's satisfactory with me.

BY MR. COLLINS: Thank you, Your Honor. I have offered these, and I ask that the mailing-jacket be identified as "Defendants #2," and the book as "Defendants #3."

BY THE COURT: Let the mailing-jacket be so marked as "Defendants #2," and received in evidence; and the library book, "The Story of the Negro," be received as "Defendants #3," with leave of Court granted to return the book to circulation at the Audubon Regional Library.

XQ Mrs. Perkins, on this card which was sent to Henry Brown, the following statement is made: "You may return the book either by mail or to the Blue Bookmobile, whichever will be the most convenient." What is the significance of that statement?

A Patrons who live out of Town are always given this choice.

XQ Isn't it a fact that the purpose of this card was to preclude the defendant from returning to the Audubon Regional Library?

BY MR. KILBOURNE: If Your Honor please, I object, I suggest that the card speaks for itself.

BY THE COURT: Sustain the objection.

XQ Isn't it a fact, Mrs. Perkins, that the Blue Bookmobile was the one that was designated to be used by Negroes only?

BY MR. KILBOURNE: I object, Your Honor, its irrelevant.

BY THE COURT: Sustain the objection.

BY MR. COLLINS: To which ruling of the Court, counsel for the defendants respectfully reserve a Bill of Exceptions, making the question, and the record a part thereof.

BY MR. COLLINS: That's all I have.

CROSS EXAMINATION

BY MR. BELL:

XQ One question more, Your Honor, I think the witness testified on direct, or on cross, that the Audubon Regional Library owned 2 Bookmobiles, is that not correct, Mrs. Perkins?

A We do not own, we have the use thereof, yes.

XQ Who owns the machines, Mrs. Perkins?

A The Bookmobiles are loaned to the Audubon Regional Library by the Louisiana State Library.

XQ In the card that was introduced, you referred to one of them as "Blue", what is the color of the other Bookmobile, Mrs. Perkins?

A It is red, you mean the Blue and the Red?

XQ Yes. You have a Red Bookmobile, and a Blue Bookmobile, is that correct, that services the Audubon Regional Parishes?

A Yes.

XQ I think you mentioned that they serve 33 schools, that's both the white and colored schools, is that correct, Mrs. Perkins?

A Yes.

XQ In the postcard you specified that Henry Brown return this particular book, "The Story of the Negro, by Arna Bontemps," either by mail or to the Blue Bookmobile, is that correct?

A I did not specify, I said, "may."

XQ "You may return the book either by mail or to the Blue Bookmobile?"

A Yes.

XQ You did not mean to imply by that statement that he could not return it to the Red Bookmobile?

A "May" is permissive.

XQ "May?"

A Yes.

BY MR. BELL: Thank you, Mrs. Perkins.

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WITNESS EXCUSED

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THE WITNESS, SHERIFF ARCH V. DOUGHTY, AFTER FIRST HAVING BEEN DULY SWORN TO TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP HIM GOD, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. KILBOURNE:

Q Please state your name for the record?

A Arch V. Doughty.

Q Sheriff Doughty, did you have an occasion to arrest the defendants in this case on the 7th of March at the Audubon Regional Library here in Clinton?

A I did.

Q Do you recall about what time that was?

A Right around 11:00 or 11:30, I believe, between 11:00 and 12:00.

Q Would you tell the Court just what you found when you got to the Regional Library?

A ✓ When I got there, I believe a couple of the Deputies were there already, Mrs. Perkins, Mrs. Reeves; and the 5 defendants were in the building, Henry Brown was sitting at a table or desk. Mrs. Perkins told me that she had taken an application--or someone had taken an application, and had asked them to leave. I, in turn asked them to leave, and Henry Brown more or less acted as a spokesman for them, he said that it was a public library, and he wanted service there. I asked him the specific question, if he would leave, and he said that he wouldn't, and I asked the others if that was their decision also, and they said it was that they were going to stay with him, and then I arrested them.

Q Sheriff, did you recall questioning some of these defendants at the jail afterwards?

A Yes, sir.

Q Do you recall--I will ask the question this way: Did you test the ability of one of these defendants to read?

A Yes, I did.

Q Do you know which one it was?

A I believe it was this one over here, on this end, right here, I don't know his name. I picked up a little piece of printed matter that was on the jailer's desk, I think it had to do with the Junior Baseball Program. He said that he had been to the Regional Library to check out a book he wanted to read, and I offered him this printed matter, and picked a paragraph I wanted him to read, and I told him to read it, to start at the top of it. He looked at it quite a while and made out a few words on it, it seemed to be pretty much of a task for him to read what was there; in fact he said it would have been very hard for him to read it.

Q Had you had some advance notice that some sort of demonstration was to take place at the Library?

A Yes, sir, I did. Normally in the past, someone affiliated with CORE usually calls when they are going to picket.

Q When you say "CORE" do you mean the Congress of Racial Equality?

A Yes, sir, the Congress of Racial Equality, and they tell me when they are going to demonstrate or picket, or whatever they intend to do, and ask for police protection. This particular day no one called me from CORE, or from anyone who had connection with the Congress of Racial Equality. I believe the first information I had on it was from Deputy Kent that they were going to sit-in, or that something was going to take place at the Library that morning. I was standing where I could see the Library, as a matter of fact, I was at my place of business when I saw these 5 colored males coming down the street from an easterly direction towards the Library. Henry Brown was in front of them and he walked up to the library-door and entered first and the other 4 followed him. I called the jail to notify the Deputies that the people had gone in there and I didn't know what for, and I got there immediately after the Deputies got there.

Q Approximately what time was it that you got this notice that some sort of demonstration was going to take place at the Library?

A I think it was about 9:00 o'clock because I had expected it all morning after I got the notice, and I remember it was close to noon and nothing had happened until I saw them coming down the street.

Q You say you saw them coming down the street, Sheriff, which way were they coming from--where were they when you first saw them?

A They were about in front of Attorney Van Buskirk's office when I saw them on the sidewalk walking towards the Library.

Q Were they in a group?

A Yes, sir.

Q Do you recognize Henry Brown?

A I knew him, yes, sir, but I didn't know any of the others.

Q Did you ascertain from the defendants or from Henry Brown where they resided?

A Yes, I did. When we booked them in at the jail I asked them where they lived and they said West Feliciana, four of them, and Henry Brown was from East Feliciana.

Q Did you ascertain from them why they were over here that day?

A I did, and they stated that they wanted to check out some books, different books. One of them stated that they were over here to integrate the Library, that was his purpose.

Q Do you recall which one it was?

A Yes, this one, the second one.

Q Sheriff Doughty, can you identify the defendants by name?

A Only Henry Brown. Let me correct myself, I could be mistaken, it might the second one from the end here, between these two over here.

Q Had you ever seen any of them besides Henry Brown before?

A I saw them when they came into Town that morning, they passed right along the street out there but I didn't know who they were, or who they were in Town with; I knew they were some I had never seen before.

Q Did you ascertain whether or not they came over from West

Feliciana together?

A Yes, sir, they did, and they didn't know who they came with, they caught a ride.

Q Will Willie Kelly please stand?

A (The witness did so.)

Q Can you identify this man here as being one of the men in the library?

A Yes, sir.

Q You may sit down. Will L. C. Bibbins stand up please? Can you identify him as being one of the defendants arrested in the Library on the 7th of March?

A Yes, sir.

Q Robert Smith please stand up?

A Robert Smith is one also.

Q Cleveland McKinzie?

A Yes, he is the other one.

BY MR. KILBOURNE: I tender the witness.

CROSS EXAMINATION

BY MR. COLLINS:

XQ Sheriff, you said that at the time you saw these 5 colored males going into the Library you then decided to go over and see what was going on, is that correct?

A When they entered the Library, I decided to go over. First, I called the jail to tell the Deputies that there were 5 colored males going into the Library. I had had some advance warning that something was going to take place there. Four of these boys were dressed in kind of macinaws, dark clothes, kind of much the same, as they were coming down the street; Brown was dressed in a light-gray, three-quarter length coat.

XQ Is there anything unusual about Negroes going into the Library in Clinton?

A I had never noticed any going in there before.

XQ To your knowledge has any Negro ever attempted to use the Library?

A I wouldn't know, I think that was only the second time I had been there myself.

XQ Sheriff, did you arrest these people, these defendants, because you considered their action going into the Library as a demonstration?

A I arrested them because the occupants of the building had asked them to leave, and so had I; it was a public building and they refused to leave.

XQ At the time you first walked into the building, Sheriff, what were these defendants doing?

A All of them were standing around a table, all except Henry Brown, he was sitting at the table, or desk.

XQ About how long was this after the time you first saw them go into the Library?

A Approximately 10 minutes.

XQ What did you tell them when you went in, Sheriff, did you have any conversations with these people?

A Not with them, I talked to Mrs. Perkins, and she told me that she had taken their application and had asked them to leave, and they wouldn't, and I asked them to leave. Henry Brown told me it was a public library, the rest of them didn't say anything.

XQ Did Brown mention anything to you about wanting a book on the Constitution of the United States?

A He did not.

XQ After Brown told you that it was a public library, what did you say then?

A I don't know of anything that I said. I was assured that Mrs. Perkins had asked them to leave since they didn't have the book they wanted.

XQ Did you, at that point, ask them to leave?

A I did.

XQ When you--

A --And I also told them that they had the choice of leaving, or be arrested for not leaving a public building when asked to do so by an officer.

XQ When you got there, Sheriff, was anybody making any noise?

A No noise.

XQ So the disturbance of the peace if any in this case, consisted of refusing to leave when ordered to do so by you, is that right?

A That's right.

BY MR. COLLINS: NO further questions.

RE-DIRECT EXAMINATION

BY MR. KILBOURNE:

Q Sheriff Doughty, had these defendants left when you asked them to, or ordered them to, would you still have arrested them?

A No, sir.

Q I believe that you already testified that when you got there Henry Brown was sitting down at a table, and the other 4 defendants were standing, is that right?

A Yes, sir.

Q Were they standing by him, or near him?

A Right near him around the table, all in a group.

Q Did anyone of them say anything to you about wanting to stay around there and read, or anything of that kind?

A I don't believe that any of them said anything except Brown, at the time, until I asked him if that was their decision to stay--the same decision that he had made, to stay or be arrested, leave or be arrested. They said that they were going to stay with Brown.

Q In your questioning of the defendants, did you ascertain if Henry Brown was the leader?

A The impression that I got, since he was in front as he came down the sidewalk, and he went into the building first, he was the leader and they were following him.

Q Whatever was said while the group was there, was he the one that was doing the talking?

A Yes.

Q Do you know Henry Brown?

A I do.

Q You see him sitting here, do you not?

A I do.

BY MR. KILBOURNE: That's all I have.

CROSS-EXAMINATION

BY MR. BELL:

XQ Sheriff, I think you stated that you only talked to Henry Brown while you were making these arrests, is that correct, sir?

A I asked Mrs. Perkins if she had asked them to leave, and she said that she had, and then I asked them to leave, and Brown was theonly one who spoke up at the time. Then I asked the others if that was their decision to stay also.

XQ What did they say?

A They said that it was, that they were going to stay with Brown. Up until then they hadn't/had anything to say to me, I don't know what was said before I got there.

XQ Prior to your asking these defendants to leave, did you ask each of them, all of them, whether or not they intended to use the reference-books at the Library?

A I didn't ask them what they intended to do, and they didn't state at that time what they were doing there.

XQ I think, as you know, Sheriff, under the Law in certain types of Disturbing the Peace situations, you have a right to ask people to move out of public or private places, as given to you by the Law; I think you stated that this was a public place?

A A public Library, yes.

XQ Did you ascertain whether or not they wanted to use this Library for reference reasons before you arrested them?

A I gathered from the information that I had gotten from Mrs.

Perkins that she had taken the application for the book they wanted, and that it wasn't available, it wasn't there, she in turn asked them to leave.

XQ Were you present when she asked them to leave, sir?

A No, I was not.

XQ But you did not ask them directly whether they intended to use the reference books?

A No, I did not.

BY MR. BELL: That's all I have, thank you, Sheriff.

BY MR. KILBOURNE: I believe that's all I have.

WITNESS EXCUSED

BY THE COURT: It is now 11:45, and before we get on another witness, suppose we adjourn for lunch until 2:00 o'clock.

COURT ADJOURNED AT 11:45 A. M.

COURT CONVENED AT 2:00 P. M.

BY MR. KILBOURNE: Your Honor, I would like to recall Mrs. Perkins to the stand.

BY THE COURT: Mrs. Perkins you have been sworn and you remain under oath in this case.

DIRECT EXAMINATION

BY MR. KILBOURNE:

Q Mrs. Perkins, how long have you been in library work?

A About 20 years.

Q How long have you worked at the Audubon Regional Library?

A Since 1960.

Q How long has the library you have worked with been in existence in the Parish of East Feliciana, in the Parish of West Feliciana, and in theParish of St. Helena?

A Its been--the library was opened in May of 1961 as a demonstration library.

Q When did it become the Audubon Regional Library operated by the 3 Parishes?

A Since last year, the first of May.

Q Have you been connected with this library here since its inception, that is since 1961?

A Yes, sir.

Q Mrs. Perkins, during that time,have you in your work in this Library ever been confronted with the situation where 5 apparently grown men walked in and demanded service under the circumstances that these defendants demanded it? Or, have you ever been confronted with a situation in which 5 grown men walked in the Library and requested service?

A I don't think so.

BY MR. BELL: Your, Honor, I would like to object. I don't see any relevancy in the question whether 5 persons had ever asked for service in a public library, and what has it to do with the guilt or innocence of this accused. The question is certainly immaterial and irrelevant, and for that reason I object to it.

BY THE COURT: It might be relevant as far as it goes to the question of whether to vacate the premises.

BY MR. KILBOURNE: For the benefit of the Court and of counsel, I will state that we are simply attempting to show that this is a very unusual situation calculated to create a disturbance.

BY THE COURT: The Court will overrule the objection.

Q What was your answer?

A I don't think so.

Q Mrs. Perkins, who was working in the Library on that particular morning?

A The person who was on duty at the Branch was Mrs. Reeves and I.

Q Do you have any male employees in the Library working?

A Not in the Branch.

Q For those who were present, did it create a disturbance, that what happened there that morning?

BY MR. BELL: I am going to object to that, Your Honor, I think the whole purpose of this trial is whether or not they violated RS 14:103.1.

Q I will withdraw the question, I will ask it this way, were you disturbed?

A Yes.

BY MR. KILBOURNE: I have no further questions. Just a minute, Your Honor, I have one more question.

Q Do you know Willie Kelly by name?

A By name, no.

Q Willie Kelly, will you stand up?

A (The witness did so.)

Q Do you know him now? Do you recognize him as being one of the defendants?

A As being one of the people there.

BY MR. KILBOURNE: That's all I have.

CROSS EXAMINATION

BY MR. BELL:

XQ Mrs. Perkins, I think you testified in answer to the District Attorney's question as to whether or not you ever had 5 persons ask for service at the Regional Library, and I think you testified that you had not.

A Not 5 at one time, and where only one person wanted the service.

XQ You don't regularly attend the request for service at the 3 Branches, do you, Mrs. Perkins?

A I am there and they usually ask me if there is something that they do not know.

XQ I think Mrs. Reeves was in charge of service at this particular Branch at that time?

A Yes.

XQ You have 2 other Branches in other Parishes with which you are in charge?

A Yes.

XQ If 5 persons had presented themselves for service at some other time, you would not have known of it unless some unusual disturbance had been called to your attention?

A That would probably be true unless I happened to be there at that Branch, which I am occasionally.

XQ And you are in charge of all 3 Branches?

A Yes.

XQ Mrs. Perkins, you testified that you were in the headquarters' portion, you were in the back, I think, at the time these persons entered?

A Yes.

XQ And you merely came to the front when you were requested to do so by Mrs. Reeves?

A Yes.

XQ While you were in the rear portion of the building, you didn't hear any disturbance, did you?

A I could hear voices back there, yes.

XQ Were they loud and boisterous?

A Not until I came out, of course they were talking.

XQ Who was talking? I think you testified that no one said anything, I think those are your words, "no one said anything." Who was talking loud?

A Henry Brown when I came out.

XQ Are you saying now that he talked loud enough to disturb you?

A Yes.

XQ I think the District Attorney asked you whether or not--which were you disturbed by, the presence of the 5 persons, or were you disturbed by the loud talking of Henry Brown?

A I simply couldn't understand, I mean, it isn't normal to loiter in the Library once you have been served. If you make no other request and want no other book, you usually get your book and go on your way.

XQ I was trying to find out, Mrs. Perkins, whether or not you were disturbed by the presence of these 5 persons, or whether you were disturbed by what you call the loud talking by one of the accused named Henry Brown?

A Well, I think it was a combination in that we had served him, and he asked for no further service.

XQ Did you ask the other persons whether they requested service or not?

A She told me that he had, and of course we had served him.

XQ Mrs. Perkins, could you tell us approximately how many persons request the use of the various libraries during the course of a day?

A We don't keep a record, I really don't know.

XQ You couldn't estimate whether its 20, 25, or 50, or 100, or

Something like that?

A No, I couldn't, because you see I am not always out at the point of service.

XQ And your records wouldn't show--

A The records we keep are circulation records which show how many books were borrowed during the day, and it would also show how many reference questions we might answer; but there is no distinction as to whether this was telephone information, or not, we have no record of it.

XQ Don't you keep records at the various libraries of who comes in to register, wouldn't that indicate to you the amount of business you are doing?

A No, it would depend on the number of people who are already registered as well, and people may come to a library once, and never come back again.

XQ Do you keep any registration-records at these libraries at all?

A We keep registration-records at headquarters, yes, and they keep a weekly-record, and a monthly-record.

XQ The headquarters are here in Clinton?

A Yes.

XQ Your records, then, would show who all is entitled to use the library?

A Well, we do not have one general registration, in other words, we do not have a headquarters, a record of every person who is qualified to use the Library. You see, this is expensive and that is why we do not do it, we have it by point of service, wherever a person is registered, that is where his registration-card is.

XQ Is a person permitted to register at/more than one of the libraries?

A No, there is not any point in registering at more than one of the libraries.

XQ Is a person permitted to use any particular--I mean, is he restricted to the use of the library where he is registered, or can he use any one of the Branches?

A Well, yes, he could.

XQ In connection with the Defense-#1, and #2, and #3, we note that you allowed one of the accused to have a book--

A Certainly.

XQ --without any, how can you charge him with the book unless you had a record of his registration?

A I checked his registration-file from the Bookmobile, and I determined that he had a card, and furthermore the identification card was there, and that there were no fines against his name, and no lost books, so therefore we gave it to him.

XQ And you did that from the registration-files at the--

A At the Blue Bookmobile.

XQ At the Blue Bookmobile?

A That is correct.

XQ On the matter of being disturbed, isn't it a fact that you were really disturbed because no Negroes usually patronized this particular Branch of the Library, they are more or less restricted to the Blue Bookmobile?

A They normally use the Blue Bookmobile, yes.

XQ And isn't it a fact that all Negroes of the 3 Parishes are registered through the Blue Bookmobile, as far as your records show?

A I believe so, yes.

XQ And aren't your records designated for registration as to race?

BY MR. KILBOURNE: If Your Honor please, I am going to object to this line of questioning, we are not trying an integration suit here today, we are trying a Disturbing the Peace charge.

A No.

BY MR. BELL: Your Honor, I don't believe--

BY THE COURT: The witness has answered the question.

BY MR. KILBOURNE: I would like to object to the further pursuance of that line of questioning.

BY MR. BELL: That's all the questions I have, thank you, Mrs. Perkins.

WITNESS EXCUSED

BY MR. KILBOURNE: I would like to recall Sheriff Doughty.

BY THE COURT: Sheriff Doughty, you have been sworn and you remain under oath in this case.

DIRECT EXAMINATION
BY MR. KILBOURNE:

Q SHERIFF Doughty, did you ascertain from the defendants that none of them was a juvenile?

A None were juveniles, they were 17 and older.

Q I believe that you have already testified that all but one was from West Feliciana Parish?

A That's right.

Q Sheriff, did you ascertain when and where the defendants got together before they came to Clinton to go to the Library?

A I tried to find that out, but they gave conflicting stories on it, some said they caught rides, and it was hard to determine just where they did get together; some said downtown in St. Francisville, some said up here at the house, at the lodge-building up north of St. Francisville.

Q Wherever they did get together, did you ascertain that they did get together for the purpose of coming to the Library?

BY MR. BELL: Objection, Your Honor, that goes to prove another line entirely, that's for conspiracy, and they are on trial for Disturbing the Peace, Your Honor, and not for the crime of conspiracy.

BY MR. KILBOURNE: Every crime involving more than two people also involves the crime of conspiracy, Your Honor.

BY THE COURT: The Court overrules the objection.

BY MR. BELL: I would like to take an Exception to that, and ask that the question, the answer, and ruling of the Court all a part of the Bill of Exceptions.

Q Will you answer the question, Sheriff?

A That was the general idea, that they had gotten together and had come to Clinton to the Library.

Q Sheriff, directing your attention to the defendant, Willie Kelly, do you recall whether or not he was specifically asked--whether he specifically said whether or not he wanted to get a book from the Library or not?

A Willie Kelly was the one that was reading the little pamphlet that I had there, and he told me that they came to Clinton to sit-in at the Library.

Q Willie Kelly toldyou that?

A He did.

BY MR. KILBOURNE: I tender the witness.

CROSS EXAMINATION

BY MR. BELL:

XQ SHERIFF, you know Mrs. Perkins and Mrs. Reeves, don't you?

A Yes, sir.

XQ Now, just for the record, they are members of the White race, are they not?

A Right.

XQ As yourself?

A Right.

XQ I think you testified that you were not called by Mrs. Perkins or Mrs. Reeves?

A I was not called, I started over there, in fact I called the Deputies to go over there when I saw these 5 boys go in the Library; and it was probably 5 minutes between the time they got there that the Deputies and myself were there.

XQ I think you testified previously that you had been alerted that a group of Negroes would try to go into the Audubon Regional Library?

A That something was going to take place at the Library, they didn't specify what; and when these 5 people, 4 of whom I didn't know go in the Library, I was interested in what was going on.

XQ Your office is not too far from the Library, isn't that right, Sheriff?

A That's right.

XQ Its right here in the Court House?

A That's right, or was at that time.

XQ Did you note at any time any White persons entering and leaving the Library?

A I saw one other person go in, I believe, after the defendants went in, and then the Deputies went in behind him.

XQ As far as you know, that person was served without any incident, is that right?

A I don't know if he went after a book or what, he just walked in behind them, and he was still there while we were there, and he was there when we left.

XQ Did you see a young White lady go in?

A I don't recall seeing anybody else go in at that time.

XQ Was she already in the Library at that time?

A Mrs. Perkins?

XQ No, one of the White patrons?

A I didn't notice anyone else going in. After the 5 defendants went in, the Deputies went in, and then I saw a White man go in.

XQ Sheriff, you have been Sheriff for several years, have you not?

A Since 1956.

XQ And your office has always been in the same place, right across the street from the Audubon Regional Library?

A In the southeast corner of the Court House.

XQ And you have a private place of business located within view of the Audubon Regional Library, isn't that right?

A That's right.

XQ In your time, since you have been here and in your place of business, have you ever seen any Negroes enter the Audubon Regional Library?

A I don't recall seeing any go in, there is quite a bit of traffic in and out over there in those different buildings, but I don't recall seeing any go in and out there.

XQ So, the fact that when 5 Negroes entered this Library, it was an unusual situation, isn't that right?

A After having been alerted that something was going to take place over there at the Library, yes.

XQ And as Sheriff of this Parish, you would be in a position to know that it has been customary for the Parish to maintain segregation of the races?

BY MR. KILBOURNE: I object, Your Honor.

BY THE COURT: I sustain the objection.

BY MR. BELL: To which ruling we except/and ask that a Formal Bill of Exceptions be reserved, making the question and the answer, and the ruling of the Court all a part of the Formal Bill.

BY THE COURT: In ruling, I think the question is not only irrelevant but misleading, and no one today can give me a definition of what segregation is. Look around this Court Room right here, and would you say we are segregated?

Ridiculous to say that we are segregated.

BY MR. BELL: No other questions, Sheriff.

RE-DIRECT EXAMINATION

BY MR. KILBOURNE:

Q Just one more question, Sheriff. In regard to your testimony about someone receiving information that something was going to happen at the Library, Sheriff, as a law-enforcement officer, did it occur to you immediately to keep the Library under surveillance when you got there?

A It did, I kept an eye on the Library, and I posted all of the Deputies, I alerted them.

Q Have you gotten warnings in the past prior to this incident that some kind of disturbance or demonstration was going to take place in the Community?

A As well as I remember, each time there has been a picket-line or anything along that line, I have always been called by someone.

Q Have you frequently recieved notice from the Federal Bureau of Investigation?

A I have, they usually want to know if we need any assistance.

BY MR. KILBOURNE: I have nothing further.

WITNESS EXCUSED

BY MR. KILBOURNE: Your Honor, the State rests.

BY MR. BELL: May it please the

Court, at this time the defense would like to move for a directed verdict on several grounds, the first of which, of course, is that the State has failed to make a case against all of the defendants, and has not proven all of the elements of the crime as charged. I would like to respectfully call attention to the Court that the record will show that the basis of foundation of any criminal prosecution is proof of the jurisdiction of the case, or whether this Court has jurisdiction; and the State has failed to prove that a crime, if any, occurred in the Parish of East Feliciana in which it is being tried. I think the record will show that the State has offered no proof that this crime occurred in this particular Parish, and for that reason the defense moves for a Directed Verdict.

BY THE COURT: Would the State like to be heard on it?

BY MR. KILBOURNE: Of course, that takes me a little bit by surprise. I believe that we have proven that the offense occurred right across the street from the Court House, right where we are sitting now; and I simply say this, I believe the Court will take cognizance of the fact that the Town of Clinton is in the Parish of East Feliciana, and the Library that we have been talking about all day is right directly across the street from the Court House, and I can't believe that counsel would urge that seriously, but that's all I have to say.

BY MR. BELL: Your Honor, I am aware--in fact I have it written here in my notes that it was brought out that the crime was located across from the Court House--that the crime was committed in the Library located across the street from the Court HOuse, but I submit that that type of proof of jurisdiction is not--its too vague and too ambiguous on which to base a conviction of 5 persons. If the Court would allow us time we could give you ample Briefs and proof that this type of proof as submitted by the District Attorney, as the proof of jurisdiction, which is the basis of any criminal prosecution, its time and time again been dissalowed by our State Supreme Court.

BY THE COURT: Didn't the Sheriff testify that this occurred across the street from the Sheriff's office, and that he was the Sheriff of East Feliciana Parish?

BY MR. BELL: That's right, but what I am saying, Your Honor, at no time was this crime alleged to have occurred, to use the word, "East Feliciana." I realize that that is a technical point, but I can assure Your Honor that this is a very serious urging of this point, and I think this is one of the things that you must prove in a criminal prosecution. The State must prove every element, every allegation of the Bill of Indictment, or Information. I think Mr. Kilbourne has alleged that this crime occurred in the Parish of East Feliciana, and no proof has been offered that it has occurred. Across the street from the Court House by the District Attorney could mean two Parishes, it could easily have been committed over in St. Francisville, which Your Honor is Judge over there too. I don't think the record would show on its face, as it stands now, this case is vulnerable for a Motion--

BY THE COURT: Counsel, I can look out of the window and see--

BY MR. BELL: I submit all of that, Your Honor.

BY THE COURT: --the Library, but of course, what you are saying is that: "Justice should be ever so blind?"

BY MR. BELL: All that I am saying, Your Honor, is that the procedure of this State, and the technicalities of criminal procedure requires that the record shows where the crime was committed without any hesitancy, without any guess.

BY THE COURT: Do you think the District Attorney should take a tape measure and measure from the Court House to the place where the incident occurred, and then have another measurement to the Parish line to be able to prove it?

BY MR. BELL: No, sir, I am saying

that he must use East Feliciana as the Parish where the crime took place; he must prove, the record must show without any hesitancy, without any ambiguity that the crime was committed in this Parish. Now, I know, but I am not going to clear the record, what these words mean, and I am quite sure that everybody in this Court Room knows what they mean; but I say that the State must use the official name to give this Court proper jurisdiction on which to base a conviction in a criminal case.

Now, we can Brief this, and we are not trying to be hypothetical, but I think this is one of the basic rules of criminal procedure, that the situs of the crime should be made very, very plain; and I think if we should read the Bill of Information it says on there, "Parish of East Feliciana," that this crime was committed on a certain date.

BY MR. KILBOURNE: If Your Honor please, Your Honor in this case would be in the same position a jury is. If

Your Honor is satisfied and knows where the crime is committed, that is all that the Law requires. I think that counsel could Brief this from now until Eternity and I am confident that he is not going to find any Law that is going to sustain what he is saying here today. I would like to have theCourt rule on his Motion so we can get on with the case.

BY THE COURT: The Court will overrule the Motion for a Directed Verdict.

BY MR. BELL: To which ruling, we respectfully except, and ask that the Motion, the argument, the objection of the District Attorney, and the ruling of the Court all be made a part of the Formal Bill of Exceptions.

BY MR. COLLINS: We would like to call for the defense, Mrs. Laura Spears.

THE WITNESS, MRS. LAURA SPEARS, AFTER FIRST HAVING BEEN DULY SWORN TO TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP HER GOD, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. COLLINS:

Q State your name, please?

A Mrs. Laura M. Spears.

Q What is your address, M^R^s. Spears?

A Box 384, Clinton, Louisiana.

Q What is your occupation?

A Unemployed housewife.

Q What is your race?

A Negro.

Q What was your former occupation?

A I was formerly employed by the Audubon Regional Library in Clinton.

Q What did you do for the Audubon Regional Library?

A ✓ I was Bookmobile 2 Assistant, I was in charge of the Blue Bookmobile. I was in charge of the service that served all Negro schools in the Communities throughout the 3 Parishes, East and West Feliciana, and St. Helena Parish.

Q Do you know the defendants in this matter?

A I know Henry Brown, he knows my parents, but I don't know him personally.

Q Did you ever have occasion to register Henry Brown with reference to his borrowing books?

A Yes.

Q Did you ever have any occasion to have any dealings with Henry Brown with reference to your duties as a Bookmobile librarian?

A Yes, I served on the Bookmobile.

Q What procedure is adopted in registering a person for books?

A Well, we issued a card to a person who filled the required information out, and the card is stamped with the word, "Negro," and date.

Q And then the person has the privilege of borrowing books, is that correct?

A Yes.

Q Do you ever register any white persons to borrow books?

A No.

BY MR. KILBOURNE: If Your Honor please, I want to object to that question, its irrelevant, immaterial.

BY MR. COLLINS: Your Honor, we think this question is very relevant to the very basis of this charge. We intend to prove by this question the segregated system with reference to library services in the Parish of not only East Feliciana, but throughout the region serviced by the Audubon Regional Library. I think we cannot do it except by this line of questioning.

BY THE COURT: The Court will overrule the objection.

Q Have you ever registered any White persons?

A No.

Q Why is that that you haven't?

A Well, the only persons who use the Blue Bookmobile is Negroes, and the Blue Bookmobile serves the 3 Parishes for all Negroes; and occasionally if a White person would come to the Blue Bookmobile, I would give them a schedule telling them when the Red Bookmobile would come, or the nearest Branch to them.

Q Did Negroes customarily use the Branch Library located in the City of Clinton?

A No.

Q If they wanted books, how would they get their books?

BY THE COURT: Counsel, I don't think there is any foundation laid for that question.

BY MR. KILBOURNE: Your Honor, I never did understand your ruling on the last objection I made, I never was heard on it.

BY THE COURT: I think we will just stop pursuing any more on this; I think we are trying a case here as to whether or not there was any disturbance that was unusual by these patrons, the defendants.

BY MR. COLLINS: Your Honor, I think we are getting up to that question with reference to the presence of these persons in the Library, that's the very issue of the case.

BY THE COURT: The witness has testified that she has been on a Bookmobile, she has said nothing about being in the Library; now she is testifying about what has taken place in the Library.

Q How long were you employed by the Audubon Regional Library?

A Two years and six months

Q When did you start your employment?

A April 12, 1961.

Q At this time you were then employed as a Bookmobile Librarian, is that correct?

A Bookmobile 2 Assistant.

Q How long did you continue in this capacity?

A From December--pardon me, until December 31, 1963.

Q In your capacity as a Bookmobile 2 Assistant, did you have occasion to frequent the Clinton Branch of the Audubon Regional Library?

A The Clinton Branch is headquarters for all of the Bookmobiles, and we would have to leave there every morning and come back in the afternoon.

Q So that you would be in a position to know whether or not Negroes used the facilities of the Clinton Branch of the Audubon Regional Library, is that correct?

A Yes, I would know about when I was in, now I don't know about when I was out.

BY MR. COLLINS: I tender the witness.

CROSS EXAMINATION

BY MR. KILBOURNE:

XQ As far as this particular case is concerned, you have no personal knowledge of it, whatsoever, do you?

A No.

BY MR. KILBOURNE: I have no further questions.

BY MR. COLLINS: THE defense rests, Your Honor.

BY MR. KILBOURNE: The State closes.

BY THE COURT: This is a case, the State of Louisiana vs Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith, and Cleveland McKinzie, in which they are charged with violation of R S 14:103.1 relative to Disturbing the Peace and with the intent of provoking a Breach of the Peace, and under the circumstances such that a Breach of the Peace might be occasioned thereby, they congregated together in the Audubon Library building in the Town of Clinton, Louisiana, and did then and there fail and refuse to leave such premises when ordered to do so by Mrs. Marshall Perkins who was then and there in lawful charge of said premises; and that further, the accused failed to leave said premises when ordered to do so by Arch V. Doughty, the Sheriff of the Parish of East Feliciana.

There has been great effort to make these facts of this case much more difficult than it is, I guess better in keeping with the trends of these times.

ha

The evidence clearly shows that these 5 men went into the Library, that they asked for a book and were served, at least their order was taken. Of course, the Library at that time, being occupied only by two female library-workers, they then asked the parties to leave. This was done twice, and finally the Sheriff again asked them to leave.

Considering these facts and the further Law on the case which has been prescribed by the Legislature of this State, that is: A misdemeanor termed by anyone doing the following acts in a manner disturbing the public. Paragraph one includes the refusal to leave the premises when requested or directed to do so by the owner, lessee, or any employee.

Clearly the evidence shows that these parties did not congregate when they came to the Town of Clinton, to the Audubon Parish Library, merely for the purpose of seeking service; that they had a specific motive and a specific intent, and that was, as was shown beyond any reasonable doubt, to refuse to leave the Library even after they had been served, and after they had been requested three times.

If the Court were to say that people who had been entrusted with the control of the property of this State, this Parish which belongs to all of us, were to be able to be flagrantly repudiated with a new system of contempt, and ridicule, certainly we would no longer exist then as a society of men and Law.

The Court will find the 5 defendants guilty as charged. The Law, counsel, allows 24 hours delay before sentencing unless you desire to waive same.

BY MR. BELL: May it please the Court, of course we are not going to except to the Court's ruling, but we would like to request an extension of time before sentencing/so that we may obtain a complete transcript from the Court Reporter in order to prepare any post trial motions that we care to entertain.

BY THE COURT: How about May 26? Let the record show that an extension for sentencing is granted until May 26.

COURT ADJOURNED.

PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

I, ERMA PARDEN, reporter within and for the Parish of East Baton Rouge, State of Louisiana, do hereby certify as follows:

That the witnesses have been duly sworn to testify to the truth, the whole truth and nothing but the truth, and the foregoing testimony was taken by me and was reduced to typewriting by me.

I further certify that the aforesaid transcript constitutes a true record of the testimony given by said witnesses.

I further certify that Richard Kilbourne, Esq., District Attorney, R. G. Van Buskirk, Esq., and W. F. Kline, Esq., appeared as attorneys for plaintiff; that Murphy W. Bell, Esq., and Lolis E. Elie, Esq., appeared as attorneys for defendants; that Robert F. Collins, Esq., appeared as attorney for defendants on April 9, 1964; and that each was present during the trial.

I further certify that I am not an attorney or counsel for any of the parties, nor am I a relative or an employee of any attorney or counsel connected with the action, nor am I financially interested in the action.

Baton Rouge, Louisiana, this 14th day of July, 1964.

Erma Parden
Reporter, Erma Parden
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

THE FOLLOWING PAGES ARE THE BEST
AVAILABLE.

[illegible] of the State of Louisiana

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[illegible] of the State of [illegible]

[illegible]

[illegible]

[illegible] Building, [illegible]

[illegible]

[illegible]

[illegible] in the above named cause it has [illegible]

[illegible] to the Honorable [illegible]

[illegible] United States District Court for the [illegible] District of [illegible]

[illegible] restraining order preliminary to hearing upon motion for [illegible] injunction should issue, without notice, because [illegible] and irreparable injury, loss or damage will result to the [illegible] before notice can be served and a hearing had thereon in [illegible] of the defendants in using the [illegible] to implement the [illegible]

[illegible]

[illegible] of the [illegible]

[illegible]

Mail to Carl Rachlin

MAR 30 1964

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

HENRY BROWN, ET AL
Complainant

COMPLAINT

vs.

CIVIL ACTION

NUMBER

JIMMIE H. DAVIS
As Governor of the State of Louisiana
JACK P. F. GREMILLION
As Attorney General of The State of Louisiana
RICHARD KILBOURNE
As District Attorney for The Parish of East Feliciana
J. H. HENRY
As Chairman of the Board of Commissioners of
The Louisiana State Library
MRS. MARCIA PERKINS
As Agent for the Louisiana State Library

* *

COMPLAINANT:

HENRY BROWN, complainant in this action is a Negro of age and a citizen of the State of Louisiana.

DEFENDANTS:

JIMMIE H. DAVIS is the Governor of the State of Louisiana.

JACK P. F. GREMILLION is the Attorney General of the State of Louisiana

RICHARD KILBOURNE is the District Attorney of the Parish of East Feliciana, Twentieth Judicial District.

J. H. HENRY is the Chairman of the Board of Commissioners of the Louisiana State Library.

MRS. MARCIA PERKINS is an employee of the Audubon Regional Library at Clinton, Louisiana.

A.) All of the defendants are male, except Mrs. Perkins; and all are caucasian and they and their successors in office are cited in their official capacity.

ISDICTION

JURISDICTION IS BASED ON:

1.) Section I of The Fourteenth Amendment.

2.) 28 U.S.C. 1331

3.) 28 U.S.C. 1343 (3)

4.) 28 U.S.C. 2201

5.) 28 U.S.C. 2202

6.) 28 U.S.C. 2281

7.) 28 U.S.C. 2284

8.) 42 U.S.C. 1981

9.) 42 U.S.C. 1983

10.) Rule 23 (A) (3) Federal Rules of Civil Procedure.

11.) Rule 65 (B) Federal Rules of Civil Procedure.

Can jx be
based on federal
Rules?

SUMMARY OF SECTIONS RELIED ON FOR JURISDICTION:

1.) Section I Fourteenth Amendment Provides:

> "...No State shall...Deny to any person within its jurisdiction the Equal Protection of the Laws."

2.) 28 U.S.C. 1331 Provides:

> Original Jurisdiction in Civil Actions in Controversies over $10,000.00.

3.) 28 U.S.C. 1343 (3) Provides:

> Original Jurisdiction in Civil Actions for State Deprivation of Rights, Privileges or Immunities granted by U. S. Constitution or U. S. Laws.

4.) 28 U.S.C. 2201 Provides:

> For Declaratory Judgments.

5.) 28 U.S.C. 2202 Provides:

> For Further Relief Based on Declaratory Judgments.

6.) 28 U.S.C. 2281 Provides:

> Against interlocutory or permanent injunctions based on the unconstitutionality of State Statutes except by a Three Judge Court.

7.) U.S.C. 2284 Provides:

> Convening of Three Judge Court.

8.) 42 U.S.C. 1981 Provides:

> Federal Statutory guarantee to Equal Protection of the Laws.

9.) 42 U.S.C. 1983 Provides:

> Actions against persons who under color of law
>
> subject citizens to deprivation of rights, privileges or immunities granted by U. S. Constitution or Laws.

NATURE OF CAUSE OF ACTION

This is a class action praying for:

1.) Issuance of a temporary restraining order, preliminary and final injunctions against all defendants enjoining them from prohibiting Negroes from the use of the public libraries in East Feliciana Parish.

2.) Issuance of a temporary restraining order, preliminary and final injunctions against all defendants enjoining them from prosecuting the charges against ~~them,~~ PETITIONERS Namely, bill of information number B-4420, entitled State of Louisiana versus Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith and Cleveland Mc Kinzie which charges a violation of L.S.A.-R.S. 14:103.1.

3.) Alternatively, should it be deemed that this matter presents ? a substantial constitutional question then a three Judge District Court should be convened.

4.) Issuance of a declaratory judgment declaring that the arrest of any Negro and/or white person accompanying a Negro or acting in concert with a Negro, and charge, either city or state, and the prosecution and conviction for attempted peaceful use of the Clinton Branch or any public library in the Parish of East Feliciana in void being in violation of the equal protection and due process of laws clauses of the Fourteenth Amendment to the U. S. Constitution.

5.) Plaintiffs and all other Negro citizens of the United States are threatened with irreparable injury by reason of the conditions herein complained of. They have no plain adequate or complete remedy to redress there wrongs other than by this suit. Any other remedy would be attended by such uncertainties and delays as to deny substantive relief and would involve a multiplicity of suits and cause further irreparable injury, damage and inconvenience to plaintiffs and all other Negro citizens of the United States.

STATEMENT OF FACTS
~~OF~~ And
AFFIDAVIT OF COMPLAINANT

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority personally came and appeared:

HENRY BROWN

who after first being duly sworn did depose and say that on Saturday, March 7, 1964 at about 11:30 a.m. he and WILLIE KELLY, L. C. BIBBINS, ROBERT SMITH and CLEVELAND Mc KINZIE all Negroes attempted to use the facilities of the AUDUBON REGIONAL LIBRARY located in Clinton, Louisiana, East Feliciana Parish.

After we arrived in the library I sat at a table and a white lady came out and asked me if she could be of any help. I told her I wanted a book on the Story of the Negro. She replied that she did not have any but that she would take an order for it and that I should check the bookmobile for it. She said that she would see that it was on the Bookmobile. I also asked the lady did she have a book on the constitution of the United States. She said she did but that I'd have to get it from the bookmobile. I asked her why I couldn't get the book.here and she replied that it was against parish rules. She asked me to leave and I refused. She then left, went into another room and returned shortly with a second white lady whose name I also do not know. This second lady said weren't you asked to leave and I said yes but I refuse to leave until I am served. About this time about four police officers arrived and I was given a choice of leaving or going to jail as was the other people with me. We chose to go to jail.

While we were in the library and before we were arrested an unknown white girl came in and secured a book and left.

We have been charged with violation of L.S.A.-R.S. 14:103.1 disturbing the peace.

HENRY BROWN

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 25TH DAY
OF MARCH, 1964.

NOTARY PUBLIC

CLAIM

Your complainant and all other Negroes similarly situated now suggest to the Court that they were refused service at the Audubon Regional Library on March 7, 1964, a State operated public library; that said refusal was solely because of race; that as a result of their attempt to use these facilities they were arrested and charged with violation of a State Statute L.S.A.-R.S. 14:103.1, Disturbing the Peace; and that said refusal to serve and accomodate them and said arrest is a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution and also the due process and privileges and immunities clause of the Fourteenth Amendment and the laws of the United States.

WHEREFORE, your complainants pray that:

1. This Honorable Court issue a temporary restraining order without notice enjoining all defendants from enforcing a policy of segregation & discrimination in the Public Library facilities in the Parish of East Feliciana and that all defendants be further restrained from prosecuting the charges against complainants in bill of Information Number B-4420 entitled State of Louisiana versus Henry Brown, Willie Kelly, L.C. Bibbins, Robert Smith and Cleveland McKinzie, which case is lodged in the Twentieth Judicial District Court for the Parish of East Feliciana.

2. That the Court advance this complaint on the docket and order a speedy hereof according to law and that upon such a hearing the Court enter a temporary injunction enjoining the defendants from enforcing a policy of segregation in the Public Library facilities in the Parish of East Feliciana and that all defendants be enjoined from prosecuting the charges against complainants in bill of information number B-4420 entitled State of Louisiana versus Henry Brown, Willie Kelly, L.C. Bibbins, Robert Smith and Cleveland McKinzie, which case is lodged in the Twentieth Judicial District Court for the Parish of East Feliciana.

3. That the Court upon final hearing of this cause enter a permanent injunction, enjoining defendants from enforcing a policy of segregation in the Public Library facilities in the Parish of East Feliciana and that all defendants be permanently enjoined from prosecuting the charges against complainants in Bill of Information number B-4420 entitled State of Louisiana versus Henry Brown, Willie Kelly, L.C. Bibbins, Robert Smith and Cleveland McKinzie which case is lodged in the Twentieth Judicial District Court for the Parish of East Feliciana.

4. The Court upon final hearing of this cause declare the rights of the parties; namely that Negroes are entitled to the unhampered and unmolested free use of all the Public Library facilities of the Parish of East Feliciana without fear of being coerced by the enforcement of State Statutes or city ordinances.

5. Alternatively, complainants pray that should it be deemed that this matter presents a substantial federal question, then a Three Judge District Court should be convened to give the relief requested in paragraphs one through four above.

6. The Court allow petitioners their costs and attorney fees and such other and further relief as may appear just and proper.

ATTORNEYS FOR COMPLAINANTS
ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE
2211 DRYADES STREET
NEW ORLEANS, LOUISIANA

BY:______________________

MURPHY BELL
917 SOUTH 13TH STREET
BATON ROUGE, LOUISIANA

OF COUNSEL:

CARL RACHLIN
38 PARK ROW
NEW YORK 38, NEW YORK

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

HENRY BROWN

who being duly sworn did depose and say that he is one of the petitioners in the above and foregoing complaint, that he has read the complaint and that all of the allegations of fact contained therein are true and correct.

HENRY BROWN

SWORN TO AND SUBSCRIBED
BEFORE ME THIS DAY
OF MARCH, 1964.

NOTARY PUBLIC

PLEASE SERVE:

HON. JIMMIE H. DAVIS, STATE CAPITOL, BATON ROUGE, LOUISIANA

HON. JACK P.F. GREMILLION, SUPREME COURT BUILDING, NEW ORLEANS, LOUISIANA

HON. RICHARD KILBOURNE, COURTHOUSE BUILDING, CLINTON, EAST FELICIANA PARISH, LOUISIANA

HON. J.H. HENRY, STATE LIBRARY COMMISSION, BATON ROUGE, LOUISIANA

MRS. MARCIA PERKINS, AUDUBON REGIONAL LIBRARY, CLINTON, EAST FELICIANA PARISH, BATON ROUGE.

Mayor
chief of Police
Clinton

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

HENRY BROWN ET AL. PLAINTIFFS	CIVIL ACTION
VS	NUMBER
JIMMIE H. DAVIS ET AL. DEFENDANTS	TEMPORARY RESTRAINING ORDER

TO THE HONORABLE THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION

Whereas in the above named cause it has been made to appear by the verified complaint filed herein which was on the_____day of___________ 1964, presented to the Honorable__________________________, Judge of the United States District Court for the Eastern District of Louisiana, that a restraining order preliminary to hearing upon Motion for a Preliminary injunction should issue, without notice, because immediate and irreparable injury, loss or damage will result to the plaintiffs before notice can be served and a hearing had thereon in that the unlawful acts of the defendants in using the coercive powers of the state criminal processes to implement the discriminatory policies of the Board of Commissioners of the Louisiana State Library and the Audubon Regional Branch Library are violative of the equal protection clause and Due Process clause of the Fourteenth Amendment to the United States Constitution and the United States laws enacted pursuant thereto; and whereas notice and hearing before entering a temporary restraining orde should not be required because the plaintiffs do not have any remedy at law, no injury can be caused defendants by such order, and the discriminatory policy of the Board of Commissioners of the Louisiana State Library and the Audubon Regional Branch Library are palpably in violation of the law of the land.

Now, therefore, on Motion of the plaintiffs:

It is ordered that the defendants Hon. Jimmie H. Davis; Hon. Jack P.F. Gremillion; Hon. Richard Kilbourne; Hon. J.H. Henry; and Mrs. Marcia Perkins and each of them, and their officers, agents, servants, employees and attorneys and those in active concert with them who receive actual notice of this order by personal service or otherwise, be and they are hereby enjoined from enforcing a policy of segregation of the races based solely on race in the Public Library system of the Parish of East Feliciana; further each defendant is hereby enjoined from prosecution of the case identified by the number B-4420 styled State of Louisiana vs. Henry Brown, Willie Kelly, L.C. Bibbins, Robert Smith and Cleveland McKinzie, which case is lodged in the Twentieth Judicial District Court for the Parish of East Feliciana. This restraining order issued at------------o'clock _____m this _____day of ___________1964.

____
UNITED STATES JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

HENRY BROWN ET AL.
PLAINTIFFS

VS

JIMMIE H. DAVIS ET AL.
DEFENDANTS

CIVIL ACTION

NUMBER

MOTION FOR PRELIMINARY INJUNCTIO

TO THE HONORABLE, THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION.

COMES, now through undersigned counsel, Henry Brown et al, plaintiffs herein and respectfully move this Honorable Court for the issuance of a preliminary injunction preliminarily enjoining all the defendants herein, their officers, agents, servants, employees and attorneys and those persons in active concert or participation with them, who receive actual notice of such preliminary injunction by personal service or otherwise from enforcing a policy of segregation of the races based solely on race in the Public Library System of the Parish of East Feliciana; further, said preliminary injunction it is submitted should enjoin all the defendants herein, their officers, agents, servants, employees and attorneys and those persons in active concert or participation with them who receive actual notice of such preliminary injunction by personal service or otherwise from further prosecuting that criminal case in the Twentieth Judicial District identified by the number B-4420 and styled State of Louisiana vs Henry Brown, Willie Kelly, L.C. Bibbins, Robert Smith and Cleveland McKinzie.

ATTORNEYS FOR PLAINTIFFS
ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE
2211 DRYADES STREET
NEW ORLEANS, LOUISIANA

BY:______________________________

MURPHY W. BELL
917 SOUTH 13TH STREET
BATON ROUGE, LOUISIANA

OF COUNSEL:

CARL RACHLIN
38 PARK ROW
NEW YORK 38, NEW YORK

MAY 4 1964

CORE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

MINUTE ENTRY:
APRIL 28, 1964
WEST, J.

HENRY BROWN, ET AL

VERSUS

JIMMIE H. DAVIS, As Governor
of the State of Louisiana,
ET AL

CIVIL ACTION

NUMBER 2961

* * * * *

This matter came on this day pursuant to previous assignment for hearing on petitioners' application for the issuance of a preliminary injunction. At the commencement of the hearing, respondents filed a motion to dismiss; a motion to dismiss or compel amendment of complaint; and a motion to fix amount of security for issuance of preliminary injunction, whereupon the Court reserved ruling on the motions and allowed petitioners to commence presentation of evidence. After hearing a portion of the first witness's testimony, Court was recessed and a conference held in chambers between the Court and counsel for all parties. In accordance with the agreement entered into between counsel at this conference:

IT IS ORDERED that the portion of the testimony taken from petitioners' witness, Henry Brown, be physically stricken from the record herein, reserving to petitioners the right to re-introduce this evidence if and when a hearing on the merits of this matter is reached.

why?

IT IS FURTHER ORDERED that counsel for all parties shall have until June 9, 1964 to file herein depositions, affidavits, or other evidence in connection with the factual allegations made by respondents in the motions filed this day, and all parties shall have until the same date, June 9, 1964, to file briefs in connection with these motions. On June 10, 1964, all motions pending will be considered submitted on the record as it then stands, and on the briefs of counsel, without further argument.

IT IS FURTHER ORDERED that hearing on the merits of this case be, and it is hereby CONTINUED, subject to re-assignment after disposition of pending motions in accordance herewith.

Robert F. Collins
Lolis E. Elie
Nils R. Douglas
Murphy W. Bell
Carl Rachlin

Jack P. F. Gremillion
Frank L. Dobson
Thomas W. McFerrin

JUL 13 1964

File

TWENTIETH JUDICIAL DISTRICT COURT

PARISH OF EAST FELICIANA

STATE OF LOUISIANA

STATE OF LOUISIANA

VS. NO. B-4420

HENRY BROWN, WILLIE KELLY,
L.C. BIBBINS, ROBERT SMITH
AND CLEVELAND McKINZIE FILED:_______________

"""

MOTION FOR A NEW TRIAL

NOW INTO COURT, through undersigned counsel come, HENRY BROWN, WILLIE KELLY, L.C. BIBBINS, ROBERT SMITH and CLEVELAND McKINZIE, defendants in the above entitled and numbered cause and now move the court to set aside the judgment rendered in this cause and grant a new trial, for the following reason: (Defendants herein especially reserving the right to enlarge and more particularly articulate the herein motion after receipt of transcript from the court reporter, Mrs. Erma Parden).

1.

There is no evidence in the record to support the judgment, WHEREFORE, movers pray that this motion be granted and a new trial be ordered in these proceedings.

By Attorneys:

OF COUNSEL:

Carl Rachlin, Esq.
38 Park Row
New York 38, N.Y.

Collins, Douglas & Elie
2211 Dryades St.
New Orleans, La.

MURPHY W. BELL
971 South 13th St.
Baton Rouge, La.

By:_______________________
MURPHY W. BELL

SUPREME COURT OF LOUISIANA

No. 46,084

STATE OF LOUISIANA

versus

GEROME SMITH, DAVID J. DENNIS, DORIS J. CASTLE, JULIA AARON AND CONSTANCE BRADFORD.

Appeal from the Criminal District Court for the Parish of Orleans, State of Louisiana, Section "G"; Hon. Shirley G. Wimberly, Judge Presiding.

ORIGINAL BRIEF IN BEHALF OF DEFENDANTS AND APPELLANTS.

COLLINS, DOUGLAS & ELIE,
ROBERT F. COLLINS,
NILS R. DOUGLAS,
LOLIS E. ELIE,
2211 Dryades Street,
New Orleans 13, Louisiana,
Attorneys for Defendants and Appellants.

Of Counsel:
CARL RACHLIN,
280 Broadway,
New York, New York.

Montgomery & Co., "The Brief Specialists", 430 Chartres St., N. O., La.

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SUPREME COURT OF LOUISIANA

No. 46,084

STATE OF LOUISIANA

versus

GEROME SMITH, DAVID J. DENNIS, DORIS J. CASTLE, JULIA AARON AND CONSTANCE BRADFORD.

Appeal from the Criminal District Court for the Parish of Orleans, State of Louisiana, Section "G"; Hon. Shirley G. Wimberly, Judge Presiding.

ORIGINAL BRIEF IN BEHALF OF DEFENDANTS AND APPELLANTS.

STATEMENT OF JURISDICTION.

This Honorable Court has jurisdiction of this matter by virtue of *Article VII, Section 10, paragraph seven, of the Louisiana Constitution*, wherein it is provided:

> "The Appellate jurisdiction of the Supreme Court shall also extend to criminal cases on questions of

law alone, wherever the penalty of death, or imprisonment at hard labor, may be imposed; or where a fine exceeding three hundred dollars or imprisonment exceeding six months has been actually imposed."

The Criminal District Court for the Parish of Orleans in matter Number 170,602 (Supreme Court Number 46,084) sentenced each defendant on count one to pay a fine of Three Hundred and Fifty Dollars ($350.00) and serve three months in the Parish Prison, and three months additional in default of payment of fine. Defendants were sentenced on count two to pay a fine of Two Hundred Dollars ($200.00) and serve two months in the Parish Prison and two months additional in default of payment of the fine. These sentences were to run consecutively.

START

PRINCIPLES OF LAW.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1, Fourteenth Amendment, U. S. Constitution.

Freedom of speech, which is guaranteed by the First Amendment against abridgment by the Federal Government, is also within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.

Cantwell v. Conn., 310 U. S. 296.

The streets are the natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

Schneider v. State, 308 U. S. 147.

It is the duty of municipal authorities, as trustees for the public, to keep the streets open and available for movement of people and property, the primary purpose to which the streets are dedicated; and to this end the conduct of those who use them may be regulated; but such regulation must not abridge the constitutional liberty of those who are rightfully upon the streets to impart information through speech and picketing.

Schneider v. State, 308 U. S. 141.

Freedom of speech guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.

Thornhill v. Alabama, 310 U. S. 88.

End

STATEMENT OF FACTS.

The Congress of Racial Equality, commonly known as C.O.R.E., had picketed two downtown New Orleans five- and ten-cent stores since March 11, 1961. (Tr. p. 69.)* These stores were F. W. Woolworth, 1041 Canal Street, and McCrory's, 1005 Canal Street. On the afternoon of Monday, April 17, 1961, two separate arrests were made in which a total of five persons were taken into custody. Gerome M. Smith and David J. Dennis were the first arrested; Doris Castle, Julia Aaron and Constance Bradford were later arrested. These persons were charged with violations of L. S. A.-R. S. 14:100.1 (Obstructing Public Passages) and 14:103.1 (Disturbing the Peace), both state statutes. Of these five all but Constance Bradford were tried and convicted on both charges. Constance Bradford has not yet been tried because she was attending school in the country of Scotland.

All defendants were arrested while picketing the rear entrances of the stores; each defendant except Constance Bradford carried a picket sign about three feet high by two feet wide (Tr. p. 112), mounted on a stick; in essence the picket signs protested against racial discrimination at lunch counters (Tr. p. 67); the picketing was conducted on a sidewalk eight feet by two inches wide (Tr. p. 106); on their trips backwards and forwards across the rear of these stores defendants walked on or near the curbing (Tr. pp. 119, 120); sometimes three-quarters of the sidewalk was available for pedestrian traffic (Tr. pp. 121, 122), and at no time was less than one-half of the sidewalk available for pedestrian traffic. In addition to this, appellants were constantly in motion and at no time did they stop walking. The defendants spoke to no one; did not pass out circulars; did not stop anyone from entering or leaving the stores; did not cause a crowd to gather; did not engage in any fights or disturbances of any sort, and the managers of the two stores did not complain to the police.

After picketing for a short while each defendant was approached by a police officer and asked to stop; each defendant refused and was therefore arrested.

SPECIFICATION OF ERRORS.

1. The trial judge committed prejudicial error when he failed to declare the application of the statutes unconstitutional in that here the statutes were applied to deprive defendants of freedom of speech and expression guaranteed by the First Amendment to the United States Constitution and of due process and equal protection guaranteed by the Fourteenth Amendment to the United States Constitution. (Bill of Exception No. 1.)

2. The trial judge committed prejudicial error when he failed to sustain the motion for a directed verdict in that there was absolutely no evidence tending

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* References are to pages of the transcript of record.

to show that defendants committed a breach of the peace. (Bill of Exception No. 2.)

3. The trial judge committed prejudicial error when he refused to grant a new trial and to sustain the motion in arrest of judgment. (Bills of Exception Nos. 3 and 4.)

ARGUMENT.

I. The Second Count of the Bill of Information Is Fatally Defective Because It Fails to Inform Defendants of the Nature and the Cause of the Accusation Against Them.

It is the position of the defendants that the count of the Bill of Information charging violation of L. S. A.-R. S. 14:103.1 is fatally defective because it omits two of the three essential elements of the crime.

L. S. A.-R. S. 14:103.1 provides in pertinent part:

> "A. Whoever with intent to provide a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby:
>
> "(1) Crowds or congregates with others . . . in or upon . . . a public sidewalk . . . and who fails or refuses to . . . move on when ordered so to do by any law enforcement officer of any municipality . . . in which such . . . acts are committed . . . shall be guilty of disturbing the peace."

Count two of the Bill of Information in its pertinent part reads:

> "Did willfully and unlawfully violate revised statute 14:103.1 as amended by Act 69 of 1960, relative to disturbing the peace by failing and refusing to disperse on public sidewalk when ordered to do so by police . . ."

A casual comparison of the statute and count two of the Bill of Information immediately reveals that two essential elements of the statute are not included in said count two. No allegation is made of (1) intent to breach the peace nor of circumstances such that a breach of the peace could be occasioned thereby, and no allegation is made of (2) crowding or congregating with others. This count of the Bill of Information is therefore fatally defective.

As authority for the above conclusion defendants cite L. S. A.-R. S. 15:227 and Article I, Section 10, of the Louisiana Constitution of 1921. As further authority defendants cite the following quotation from the judgment on rehearing in the case of *State v. Varnado, 208 La. 319, 23 So. (2d) 106 (1944), rehearing (1945)*, which quotation originally comes from *27 Am. Jur. 660, Section 101*, and *27 Am. Jur. 662, Section 103:*

> "It is the modern rule universally applied by the courts, that in charging a statutory offense it is not necessary to use the exact words of the statute. An indictment or information for such an offense is sufficient if it follows the language of the statute substantially or charges the offense in equivalent or others of the same import, if the defendant is thereby fully informed of the particular offense charged, and the court is enabled to see therefrom on what statute the charge is founded . . ."

The effect of the interpretation by the trial Court of L. S. A.-R. S. 14:103.1 is to convert the Bill of Information from a disturbing the peace charge to a charge of refusing to move on.

A Louisiana case in point is *State v. Morgan, 204 La. 499, 15 So. (2d) 866 (1943)*. There the charge set out in the Bill of Information was "that S. R. Morgan at the Parish of Calcasieu on or about the 12th day of May in the year of Our Lord One Thousand Nine Hundred and Forty Three (1943) did unlawfully disturb the peace at 1208 Hodges Street in Lake Charles, Calcasieu Parish, Louisiana . . ."

In sustaining the motion to quash this was said at *204 La. 507:*

> "Article 103 of the Criminal Code enumerates a number of acts, the commission of which constitute the offense of disturbing the peace. None of these specific acts are referred to in the information on which relator is being prosecuted. No facts constituting the offense of disturbing the peace are set out in the information. The information merely alleges that relator was guilty of unlawfully disturbing the peace. This allegation does not set forth any act which, under the article, constitutes the offense. Nor do the words used in the information unequivocally convey the meaning of the article, so that defendant can not be misled as to the charge he is called upon to answer."

While the above case is not on all fours with the instant case, the facts are similar enough to bring it within the holding of the above. The factual differences between the two cases are negligible.

In the *Morgan* case none of the seven enumerated offenses were cited in the bill. In the instant case only one of three essential requisites were cited. In any event the result in the two cases should be the same.

As was pointed out by the Supreme Court of the United States in *United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819*, and cited in Mr. Justice Fournet's dissent at the original hearing in the *Varnado* case at *96 U. S. 362:*

> "Where the offense is purely statutory . . . it is, as a general rule, sufficient in the indictment

> to charge the defendant with acts coming fully within the statutory description in the substantial words of the statute, without expansion of the matter . . . but to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

The case of *State v. McQueen, 230 La. 55, 87 So. (2d) 757 (1955)* stands for the proposition that a bill of information which does not apprise the defendant of what he must be prepared to meet on the trial is fatally defective. This is the test set out by the Court at *230 La. 62:*

> "In this case the information is based on conclusions of law, which are legal abstractions affording no protection. The U. S. Supreme Court has spoken and provided a test in such instances. It stated that the test is not whether it (the information) could have been more definite or certain, but whether the information contains the elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet, and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. See, Cochran and Sayere v. U. S., 157 U. S. 286, 15 S. Ct. 628, 39 L. Ed. 704; Rosen v. U. S., 161 U. S. 29, 16 S. Ct. 434, 40 L. Ed. 606; Hagner v. U. S., 285 U. S. 427, 52 S. Ct. 417, 76 L. Ed. 861."

Further on the Court quite succinctly says at *230 La. 66:*

> "We do not find anywhere in the Code of Criminal Procedure provision that an accused charged in an indictment or information that fatally fails to apprise him of the acts on which the offenses with which he is sought to be charged is based must probe the innermost recesses of the prosecuting attorney's mind in an effort to ascertain just what acts of his the attorney thinks constitutes a crime."

II. The Convictions Under R. S. 14:103.1 Violate the Due Process Clause of the Fourteenth Amendment Because There Was No Evidence Tending to Prove Essential Elements of the Charge of Disturbing the Peace.

A. There Was No Evidence Tending to Prove That Petitioners Violated R. S. 14:103.1 as Charged in the Information.

In *Thompson v. City of Louisville, 362 U. S. 199,* 204, 206, the United States Supreme Court held that a conviction in a state court must be set aside under the Fourteenth Amendment "if there is no support for these convictions," or "the record is entirely lacking in evidence to support any of the charges," or is "without evidence of his guilt." The decision does not mean that an appellate court may reverse a conviction merely because, upon re-evaluating the record, it finds that the evidence is insufficient to support the conviction. The conviction violates due process, however, if there is **no evidence at all** tending to prove one or more of the essential elements of the offense.

The statute here provides:

> "Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby:
>
> "(1) Crowds or congregates with others . . . in or upon . . . a public sidewalk . . . who fails or refuses to move on when ordered so to do by any law enforcement officer of any municipality . . . in which such . . . acts are committed . . . shall be guilty of disturbing the peace."

To support a conviction under this statute there must be proof of three basic elements of the offense:

(1) Intent to breach the peace or circumstances such that a breach of the peace may be occasioned.

(2) Crowding or congregating with others.

(3) Refusal to move on.

There was no evidence whatsoever in this case to indicate an intent on the part of the defendants to breach the peace or that the circumstances here were such that a breach of the peace might have been occasioned by the peaceful picketing of the defendants.

There was no evidence whatsoever in the record to indicate that the defendants crowded or congregated with others.

Despite the fact that defendants did refuse to move on, the state could not convict here because they did not introduce evidence on the other two essential, nay indispensable, elements of the crime.

Past decisions defining disturbing the peace make it plain that R. S. 14:103.1 does not embrace peaceful conduct such as that of petitioners. In *Town of Ponchatoula v. Bates, 173 La. 823, 138 So. 851*, the Louisiana Supreme Court defined disturbance of the peace to be "any act of conduct of a person which molests the inhabitants in the enjoyment of that peace and quiet to which they are entitled, or which throws into confusion things settled, or which causes excitement, unrest, disquietude, or fear among persons of ordinary normal temperament." *173 La. at 828.* A challenge to rooted customs may cause intellectual unrest or emotional excitement, but it is plain that the Court's deficonviction in a state court must be set aside under the Fourteenth Amendment "if there is no support for these convictions," or "the record is entirely lacking in evidence to support any of the charges," or is "without evidence of his guilt." The decision does not mean that an appellate court may reverse a conviction merely because, upon re-evaluating the record, it finds that the evidence is insufficient to support the conviction. The conviction violates due process, however, if there is **no evidence at all** tending to prove one or more of the essential elements of the offense.

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The latest expression of the United States Supreme Court on want of evidence is in *Taylor v. Louisiana, 82 S. Ct. 1188.* This case involved one of the same statutes as here, L. S. A.-R. S. 14:103.1, and involved refusals by defendants to move from the bus depot in Shreveport, Louisiana, after being ordered to leave by police. The trial Court held that the mere presence of defendants there constituted a breach of the peace.

The United States Supreme Court, in a *per curiam* decision, said at 1189:

> "Here, as in Garner v. Louisiana, 368 U. S. 157, the only evidence to support the charge was that petitioners were violating a custom that segregated people in waiting rooms according to their race, a practice not allowed in interstate transportation facilities by reason of federal law . . . the judgments of conviction must therefore be reversed."

It is submitted that here, as in *Garner, supra,* and in *Taylor, supra,* that the only evidence to support the charges was that defendants refused to move on when asked to do so by the police. There is no state law in Louisiana which makes it a crime to refuse to move on when ordered to do so by the police. Compare *Sellers v. Johnson, 163 F. (2d) 877; Herndon v. Lowry, 301 U. S. 242,* and *L. S. A.-R. S. 14:7.*

There is no testimony in the record that there were fights, unrest, threats, citizen complaints, that store entrances were blocked, or even, aside from the space occupied by an individual walking with a picket sign, that the sidewalk was obstructed. It is a violation of due process to convict a person without evidence of his guilt. *Thompson v. Louisville, supra.*

III. The Disturbing the Peace Statute (R. S. 14:103.1) Under Which Petitioners Were Convicted Is Unconstitutional in Its Application If Construed, as Here, to Proscribe Peaceful Picketing.

R. S. 14:103.1, one of the statutes under which appellants were charged, has been construed by the state to make peaceful picketing illegal on the theory that it constitutes disturbing the peace. This statute also expressly exempts labor picketing, thus by implication coupled with the interpretation of the trial Court effects an unconstitutional result which was and is now prohibited. *Thornhill v. Alabama, 310 U. S. 88 (1940).*

Thornhill v. Alabama held that peaceful picketing was within the liberties protected by the First and Fourteenth Amendments. *Thornhill* further held that such interest as the state had in protecting public peace was not substantial enough to proscribe peaceful picketing. Such interest as the State of Louisiana has in protecting the public peace is not substantial enough to constitutionally support the application made of the statute.

Even if it be conceded *arguendo* that the statute might be constitutionally enforced in other circumstances, it is not so when its enforcement limits freedom of expression, as here. In a concurring opinion in *Garner v. Louisiana, 368 U. S. 157, 82 S. Ct. 248,* Mr. Justice Harlan said at 272:

> ". . . when a state seeks to subject to criminal sanctions conduct which, except for a demonstrated paramount state interest, would be within the range of freedom of expression as assured by the Fourteenth Amendment, it cannot do so by means of a general and all inclusive breach of the peace prohibition. It must bring the activity sought to be proscribed within the ambit of a statute or clause 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state.' Cantwell v. Connecticut, supra, 310 U. S. at 311; Thornhill v. Alabama, 310 U. S. 88, 105. And of course the interest must be a legitimate one. A state may not "suppress free communication of views, religious or other under the guise of conserving desirable conditions. Cantwell, supra, at 308."

Appellants here were convicted under a disturbing the peace statute which is a supplement to a preexisting disturbing the peace statute. See R. S. 14:103. The crime which the statute created is an offense very unlike the old misdemeanor of disturbing the peace. As applied here, the mere act of one person picketing peacefully against racial segregation is given the dynamic quality of a crime. There is guilt, although there were no fights, riots, angry words, molestation of the public or blocking of pedestrian traffic. Thus in effect the accused is to be punished not for an actual disturbance of the peace but for advocating an end to racial segregation.

The right of free speech is a fundamental right given a preferred position with relationship to the other freedoms guaranteed by the Constitution. This right may not ordinarily be denied or abridged. But although the right to free speech is fundamental, it is not in its nature absolute. Its exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from serious injury—political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled. See *Schenck v. United States, 249 U. S. 47, 52.*

It is the function of the Legislature to determine whether at a particular time and under the particular circumstances the intent to breach the peace or presence under circumstances such that a breach of the peace may be occasioned thereby, coupled with crowding or congregating with others and refusing to move on when ordered to do so by the police, constitutes a clear and present danger of substantive evil; and that by enacting the law here in question the Legislature of Louisiana determined that question in the affirmative. The Legislature must decide in the first instance whether a danger exists which calls for a particular protective measure. But where a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity.

The courts have not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech as the means of protection. To reach sound conclusions on these matters it is necessary to bear in mind why the state is ordinarily denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.

Fear of serious injury cannot alone justify suppression of free speech. Thus the presence of one in circumstances such that a breach of the peace may be occasioned does not qualify the state to abridge the right of appellants to peacefully picket, nor does the imputation to appellants of intent to disturb the peace qualify the state to abridge peaceful picketing. To justify the suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. In order to support a finding of clear and present danger it must be shown either that the immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

No danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. Only an emergency can justify repression. Moreover, even an imminent danger cannot justify resort to prohibition of these functions essential to effective democracy unless the evil apprehended is relatively serious. Prohibition of free speech is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. The fact that the picketing is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury **to the state.** The legislative declaration that facts existed within the state which constituted a clear and present danger to a substantial state interest creates merely a rebuttable presumption that said conditions constitutionally exist as a general proposition. We submit that the evidence on record does not constitute facts which authorize the state to constitutionally abridge the right of appellants to peacefully picket against segregation.

If a contrary conclusion were reached, then any time a Negro in Louisiana rebels, be it ever so peaceful, against segregation then he violates R. S. 14:103.1. Every time the N.A.A.C.P. or C.O.R.E. holds a meeting or every time a Negro sits in a front seat of a city bus he may have intent to breach the peace imputed to him or he may be deemed to have been present in a circumstance whereby a breach of the peace may have been occasioned. For Louisiana to infect the administration of its criminal laws by using them to support the custom of segregation offends the salutary principle that criminal justice must be administered "without reference to considerations based on race." *Gibson v. Mississippi, 162 U. S. 565, 591.*

~~IV~~. The Disturbing the Peace Statute (R. S. 14:103.1) Under Which ~~Appellants~~ APPLICANT ~~Were~~ WAS Convicted Is, If Applied to ~~Them~~ Him, So Vague and Uncertain as to Violate Due Process.

A. Due Process Requires That a State Statute Give Fair Notice of What Conduct Is Criminal.

The United States Supreme Court has repeatedly held that a state statute violates the due process clause of the Fourteenth Amendment if it fails (1) to give fair notice of what acts it encompasses and (2) to provide the trier with a sufficiently definite standard of guilt to avoid conviction on an *ad hoc* basis; *e. g., Lanzetta v. New Jersey, 306 U. S. 451; Connally v. General Con-*

struction Co., 269 U. S. 385; Musser v. Utah, 333 U. S. 95; Winters v. New York, 333 U. S. 507, 519. As the United States Supreme Court said in *Connally, 269 U. S. at 391):*

> "... a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the First essential of due process of law."

Similarly, in *Lanzetta*, the Court defined the fair notice required by due process as *306 U. S. at 453:*

> "... no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids ..."

Mr. Justice Harlan in his concurring opinion in *Garner v. Louisiana, 82 S. Ct. 248, at page 274*, said:

> "While Cantwell was not explicitly founded on that premise, it seems to me implicit in the opinion that a statute which leaves the courts in uncertainty as to whether it was intended to reach otherwise constitutionally protected conduct must by the same token be deemed inadequate warning to a defendant that his conduct has been condemned by the state ..."

Thus, when a statute gives a defendant insufficient notice of the conduct prohibited, his conviction is invalid.

B. R. S. 14:103.1 Did Not Give Fair Notice to ~~Petitioners~~ APPLICANT That ~~Their~~ HIS ~~Actions~~ ACTION ~~Were~~ WAS Illegal.

Section 103.1 has on its face several ambiguities. It is not entirely clear whether the prosecution must show an actual disturbance or only circumstances such that a disturbance may be occasioned. The statute does not indicate the meaning of the phrase "crowds or congregates with others," and since this is not a phrase of common usage one would be led to speculate as to when his conduct was such that he "crowds or congregates with others." Despite these difficulties, we assume *arguendo* that the statute is constitutional if it is construed to apply only to acts which are violent, loud or boisterous. It was only upon this interpretation that this Court sustained the constitutionality of an earlier but similar disturbing the peace statute. *State v. Sanford, 203 La. 961, 14 So. (2d) 778.*

~~Appellants~~' activities, however, did not involve a disturbance of the peace. Each of these appellants was engaged in picketing a store in protest of racial discrimination at a lunch counter. The facts clearly indicate that the police, not the public, were disturbed by the defendants' conduct. The facts show that the state, through the unwarranted action of the police, was itself promoting its own policy of racial discrimination. In such circumstances, we submit that this Court should apply a strict standard in determining whether a statute is unconstitutionally vague; for a vague statute pro-

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vides all too easy means by which a state can impose *ad hoc* criminal penalties. *Winters v. New York, 333 U. S. 507, 509-510, 517*, indicates that the degree of certainty required for due process is particularly strict in the delicate area of freedom of expression; otherwise, the Court said, expression which is constitutionally protected would be effectively prohibited by the very vagueness of the law. *Smith v. California, 361 U. S. 147, 151.*

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There is not a word in R. S. 14:103.1 which clearly and unmistakably prohibits an individual or group from peacefully ~~patrolling outside of a store~~ with a picket ~~sign~~ for the purpose of protesting racial discrimination. ~~Appellants' conduct caused no disturbance; and there was no reason to foresee a disturbance.~~ If the statute applies to these facts, it can be used to convict anyone for any conduct that the local officials, acting *ad hoc*, find distasteful.

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Interpretation of a state statute prior to the defendant's conduct may sometimes clarify otherwise indefinite language sufficiently to satisfy the requirements of fair notice. See, *e. g., Chaplinsky v. New Hampshire, 315 U. S. 568, 574; International Harvester Co. v. Kentucky, 234 U. S. 216.* This statute has not been interpreted by any appellate court of this state. However, the latest decision of this Court on the general subject of disturbing the peace, *State v. Sanford, 203 La. 961, 14 So. (2d) 778*, said the following at *203 La. 970:*

> "* * * to construe and apply the statute in the way the district judge did would seriously involve its validity under our state constitution, because it is well settled that no act or conduct however reprehensible, is a crime in Louisiana, unless it is **defined and made a crime clearly and unmistakably** by statute. * * *" (Emphasis ours.)

This Court has repeatedly recognized that under our state Constitution fair notice is an element of due process. See, *e. g., State v. Christine, 239 La. 259, 118 So. (2d) 403 (1960); State v. Sanford, supra; State v. Kraft, 214 La. 351, 37 So. (2d) 815 (1948).* In *State v. Kraft, supra*, the Court explained the requirement of certainty as follows, *214 La. at 356:*

> ". . . it is sufficient to say that a criminal statute, in order to be valid and enforceable, must define the offense so specifically or accurately that any reader having ordinary intelligence will know when or whether his conduct is on the one side or the other side of the border line between that which is and that which is not denounced as an offense against the law."

Since the statute under which applicant was ~~petitioners were~~ here convicted has never been interpreted by this Court, we must rely upon previous interpretations of a similar statute. The application of the statute here is directly contrary to the holding of the *Sanford* case, since here the state is applying this statute to punish completely X

X peaceful activity. Thus, ~~petitioners~~ applicant was were not given fair notice that ~~their~~ his conduct was criminal either by the terms of the statute or by its interpretation in the Louisiana courts.

V. The Obstructing Public Passages Statute (R. S. 14:100.1) Under Which Petitioners Were Convicted Is Unconstitutional in Its Application If Construed, as Here, to Proscribe Peaceful Picketing.

R. S. 14:100.1, one of the statutes under which appellants were charged, has been construed by the state to make peaceful picketing illegal on the theory that it constitutes obstructing public passages. This statute also expressly exempts labor picketing, thus by implication it prohibits other kinds of picketing. This prohibition by implication coupled with the interpretation of the trial Court effects an unconstitutional result which was and is now prohibited by *Thornhill v. Alabama, 310 U. S. 88 (1940).*

Thornhill v. Alabama held that peaceful picketing was within the liberties protected by the First and Fourteenth Amendments. *Thornhill* further held that such interest as the state had in protecting public peace was not substantial enough to proscribe peaceful picketing. Such interest as the State of Louisiana has in protecting the public peace is not substantial enough to constitutionally support the application made of the statute.

Even if it be conceded *arguendo* that the statute might be constitutionally enforced in other circumstances, it is not so when its enforcement limits freedom of expression, as here. In a concurring opinion in *Garner v. Louisiana, U. S. 182 S. Ct. 248,* Mr. Justice Harlan said at 272:

> ". . . when a state seeks to subject to criminal sanctions conduct which, except for a demonstrated paramount state interest, would be within the range of freedom of expression as assured by the Fourteenth Amendment, it cannot do so by means of a general and all inclusive breach of the peace prohibition. It must bring the activity sought to be proscribed within the ambit of a statute or clause 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state.' Cantwell v. Connecticut, supra, 310 U. S. at 311; Thornhill v. Alabama, 310 U. S. 88, 105. And of course the interest must be a legitimate one. A state may not 'suppress free communication of views, religious or other under the guise of conserving desirable conditions.' Cantwell, supra, at 308."

Even though this quotation referred to breach of the peace, we contend that the reasoning can be applied with equal strength to the Obstructing Public Passages Statute. Here the state is attempting to subject peaceful picketing, a kind of conduct which is ordinarily within the range of constitutionally protected freedom of expression, to criminal sanctions. The state cannot do this by means of a vague and uncertain obstructing public passages statute which is not "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state." *Cantwell v. Conn.; Thornhill v. Alabama.* Here we have a situation in which there are convictions under a statute which sets no standards and gives no definitions of its terms and leaves to the executive and judicial branches too wide a discretion in its application. The state could not under the facts of this case convict petitioners for obstructing public passages without unconstitutionally applying the statute.

VI. The Obstructing Public Passages (R. S. 14:100.1) Under Which Appellants Were Convicted Is, If Applied to Them, So Vague and Uncertain as to Violate Due Process.

A. Due Process Requires That a State Statute Give Fair Notice of What Conduct Is Criminal. (See Argument p. 21.)

B. R. S. 14:100.1 Did Not Give Fair Notice to Petitioners That Their Actions Were Illegal.

The first paragraph of *14:100.1* reads as follows:

> "No person shall wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, bridge, alley, road, or other passageway, or the entrance, corridor or passage of any public building, structure, water craft, or ferry, by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein."

This statute is most indefinite as to what conduct on the part of an individual shall "obstruct the free, convenient and normal use of various public passages. We are only told that one can obstruct by "impeding, hindering, stifling, retarding or restraining." Further, this statute does not define any of these terms which thereby subjects them to a wide variance of interpretation on the part of public officials seeking to enforce them. The terms used to "define" the offense: "impeding, hindering, stifling, retarding, restraining," are so vague and indefinite as to cause one to speculate as to when his conduct constitutes obstructing public passages. Despite these difficulties, we assume *arguendo* that the statute is constitutional if it is construed to apply to acts which effectively block a public passage in such a way as to be dangerous to the safety of individuals who pass thereon. It is only upon this interpretation that the constitutionality of this statute could be sustained, for, if this statute is construed to proscribe peaceful picketing, then it would be unconstitutional for that reason. (See Argument, p. 26.)

In the instant case the facts clearly indicate that there were two stores being picketed and that at each store there was a single picket patrolling. There was no evidence that the sidewalk was blocked. It appears that the police were concerned because the defendants' picketing put them to the extra trouble of maintaining a surveillance in the area of picketing. In arresting these defendants the state, through the unwarranted action of the police, was itself promoting its own policy of racial discrimination. In such circumstances, we submit that this Court should apply a strict standard in determining whether a statute is unconstitutionally vague; for a vague statute provides all too easy means by which a state can impose *ad hoc* criminal penalties. *Winters v. New York, 333 U. S. 507, 509-510, 517*, indicates that the degree of certainty required for due process is particularly strict in the delicate area of freedom of expression; otherwise, the Court said, expression which is constitutionally protected would be effectively prohibited by the very vagueness of the law. *Smith v. California, 361 U. S. 147, 151.*

There is not a word in R. S. 14:100.1 which clearly, and unmistakably, prohibits an individual from peacefully patrolling outside of a store with a picket sign for the purpose of protesting racial discrimination. Appellants' conduct caused no real obstruction of the sidewalk; and there was no reason to foresee an obstruction of the sidewalk. If the statute applies to these facts, it can be used to convict anyone for any conduct that the local officials, acting *ad hoc*, find distasteful.

This Court has repeatedly recognized that under our state Constitution fair notice is an element of due process. See, *e. g., State v. Christine, 239 La. 259, 118 So. (2d) 403 (1960); State v. Sanford, supra; State v. Kraft, 214 La. 351, 37 So. (2d) 815 (1948).* In *State v. Kraft, supra*, the Court explained the requirement of certainty as follows, *214 La. at 356:*

> ". . . it is sufficient to say that a criminal statute, in order to be valid and enforceable, must define the offense so specifically or accurately that any reader having ordinary intelligence will know when or whether his conduct is on the one side or the other side of the border line between that which is and that which is not denounced as an offense against the law."

Interpretation of a state statute prior to the defendant's conduct may sometimes clarify otherwise indefinite language sufficiently to satisfy the requirements of fair notice. See, *e. g., Chaplinsky v. New Hampshire, 315 U. S. 568, 574; International Harvester Co. v. Kentucky, 234 U. S. 216.* This statute has not been interpreted by any appellate court of this state. Since this is true, there has been no clarification of the vagueness of this statute, and its inherent weaknesses remain. Thus, petitioners were not given fair notice that their conduct was criminal either by the terms of the statute or by its interpretation of our appellate courts.

VII. Discriminatory Enforcement, Even If the Statutes Are Valid, Has Deprived Defendants of Equal Protection Under the Law.

Even if, *arguendo*, the statutes are constitutional on their face, defendants have been deprived of equal protection in that the application of these statutes as to them has been discriminatory due to unequal enforcement. The situation is comparable to that in *Yick Wo v. Hopkins, 118 U. S. 356 (1886)*, in which the Court, after questioning the constitutionality of an ordinance on its face, said at 373:

> ". . . whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this Court in Henderson v. Mayor, etc., of New York, 92 U. S. 259 (Bk. 23, L. Ed. 543); Chy Luny v. Freeman, 92 U. S. 275 (Bk. 23, L. Ed. 550); Ex parte Va., 100 U. S. 339 (Bk. 25, L. Ed. 676); Neal v. Delaware, 103 U. S. 370 (Bk. 26, L. Ed. 267), and Soon Hing v. Crowley, 113 U. S. 703."

Louisiana R. S. 14:100.1 as amended by Act 80 of 1960, and Louisiana R. S. 14:103.1 as amended by Act 69 of 1960, even if they are constitutional, have been arbitrarily, capriciously and discriminatorily applied and administered unjustly and illegally, and only against persons of the Negro race and/or white persons who act in concert with members of the Negro race.

As long ago as *Gibson v. Mississippi, 162 U. S. 565*, a case involving a claim of discrimination in jury procedure, the Court stated the broad proposition that racial discrimination in the administration of criminal laws violates the Fourteenth Amendment. The Court said at *162 U. S. 565, 591:*

> "The guaranties of life, liberty, and property are for all persons within the jurisdiction of the United States or of any state, without discrimination against any because of their race. **Those guaranties,** when their violation is properly presented in the regular course of proceedings, **must be enforced in the courts, both of the nation and of the state, without reference to considerations**

based upon race. In the administration of criminal justice no rule can be applied to one class which is not applicable to all other classes. (Emphasis supplied.)

The Court has repeatedly struck down statutes and ordinances which provided criminal penalties to enforce racial segregation. *Buchanan v. Warley, 245 U. S. 60; Holmes v. City of Atlanta, 350 U. S. 879; Gayle v. Browder, 352 U. S. 903, affirming 142 F. Supp. 707 (M. D. Ala. 1956); State Athletic Commission v. Dorsey, 359 U. S. 533, affirming 168 F. Supp. 149 (E. D. La. 1958)*, were all cases in which criminal laws used to maintain segregation were invalidated. *Cf. Evers v. Dwyer, 358 U. S. 202.* Likewise, in *Yick Wo v. Hopkins, 118 U. S. 356*, the Court nullified a criminal prosecution under a statute which was fair on its face but was being administered to effect a discrimination against a single ethnic group.

The police officer's demand that petitioners discontinue their picketing because of the racial segregation customs and the subsequent arrests based on this demand deprived petitioners of the equal protection of the laws. A similar arrest was said to be an illegal deprivation of civil rights by police officers in *Boman v. Birmingham Transit Co., 280 F. (2d) 531, 533, note 1 (5th Cir., 1960)*, quoting from the decision below sub nom.; *Bowman v. Morgan (N. D. Ala. 1959, C. A. No. 9255), 4 Race Relations Law Reporter 1027, 1031* (otherwise unreported):

> "A charge of 'a breach of the peace' is one of broad import and may cover many kinds of misconduct. However, the Court is of the opinion that the mere refusal to obey a request to move from the front to the rear of a bus, unaccompanied by other acts constituting a breach of the peace, is not a breach of the peace. In as far as the defendants, other than the Transit Company, are concerned, plaintiffs were in the exercise of rights secured to them by law."

CONCLUSION.

Wherefore, it is respectfully submitted that the trial Court committed prejudicial error in each of the rules complained of in Bills Nos. 1 through 4, inclusive, and it is prayed that the verdict and sentence rendered herein be set aside, annulled and vacated, and the defendants discharged, or in the alternative be granted a new trial, and for all appropriate and equitable relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, Nils R. Douglas, member of the bar of the State of Louisiana, hereby certify that a copy of this original brief on behalf of defendants and appellants has been mailed by United States mail, postage prepaid, to the District Attorney for the Parish of Orleans, State of Louisiana, namely, James Garrison, 2700 Tulane Ave., New Orleans, Louisiana.

....

No. 806

In the Supreme Court of the United States

OCTOBER TERM, 1964

HENRY BROWN, WILLIE KELLY, L. C. BIBBENS,
ROBERT SMITH AND CLEVELAND McKINZIE,
Petitioners,
v.
STATE OF LOUISIANA,
Respondent.

RESPONSE OF THE STATE OF LOUISIANA TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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Attorney for Respondent.

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No. 806

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v.

STATE OF LOUISIANA,
Respondent.

RESPONSE OF THE STATE OF LOUISIANA TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

FACTS

On Saturday morning, March 7, 1964, Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith and Cleveland McKinzie walked into the front room of the building in the Town of Clinton (pop. 1568) used to house the Audubon Regional Library. The front room of the building was used at the time as a lobby where requests for library books were taken. Only one employee, Mrs. Katie Reeves, was on duty at the time. As soon as the men entered, Mrs. Reeves asked if she could help them. (T. 60). Henry Brown handed her a slip of paper on which was written the words, "Wandell Arna, the Story of the Negro, Bontems." As he ded Mrs. Reeves the paper, Brown said, "I would to get this book." (T. 65). Mrs. Reeves then con- ed the library card catalogue and ascertained that library did not have such a book. It was later nd that no such book existed. Mrs. Reeves then told wn that the book would be ordered from the State rary and that he would be notified of its arrival. this point, Brown had taken one of the two chairs he room and the other four men were standing und him. Mrs. Reeves later testified (T. 60) that e she could not supply the book at that time, she umed that the five men would leave. When they de no move to leave, Mrs. Reeves repeated what had said about the book. No further requests for ary service were made by any of the men, they ply remained where they were without saying any- g. Mrs. Reeves then requested the five men to e. The five men simply stayed as they were. Mrs. ves then called the Librarian, Mrs. Perkins, who s in a rear room of the building. Mrs. Perkins e into the room and requested the five men to e the building. They still made no move to do so. this time, the Sheriff came into the room and ed the men to leave. When they still failed to do the Sheriff arrested them.

A bill of information was filed by the District orney on March 11, 1964 charging the five men h violating R. S. 14:103.1, relative to disturbing peace, in that, with the intent to provoke a breach he peace and under circumstances such that a

breach of the peace might be occasioned thereby, they congregated together in the Audubon Library building in the Town of Clinton, Louisiana and did then and there fail and refuse to leave said premises when ordered to do so by Mrs. Marcia Perkins, who was then and there in lawful charge of said premises and did further refuse and fail to leave said premises when ordered to do so by Arch V. Doughty, Sheriff of the Parish of East Feliciana.

On the trial of the case, it was determined that reason for the conduct of the five petitioners which resulted in their arrest, trial and conviction, was a program initiated by an organization known as Congress of Racial Equality to "test" the use of the library facilities in the Town of Clinton by members of the negro race. All of the petitioners are negroes.

ARGUMENT

There is nothing in the record in this case to indicate that defendants were arrested for any reason other than the acts charged to them in the bill of information. When they entered the library and requested a book and their order was taken for the book by the employee on duty, they had used the facilities of the library to the full extent that anyone else could. At this point, the "test" was completed. They had no further lawful business, as far as the record goes, to remain in the library room unless the Court assumes that anyone who wishes to do so can use such facilities to loaf in. The Librarian testified (T. 99) that to her knowledge, no employee of the library had

been confronted with a situation such as this
e five men, all strangers but Henry Brown, had
into the library and conducted themselves in the
ner the petitioners did. Had these men requested
further service or any further reading material,
request would certainly have been given the
courteous treatment which Mrs. Reeves gave
initially. But simply to sit there, staring vacantly,
ng no indication whatever of what they wanted or
t they might do next was certainly enough to un-
e a woman in the situation Mrs. Reeves was in,
icularly when the petitioners remained silent and
obile when Mrs. Reeves requested them to leave.

There is some testimony in the record to the ef-
that when Mrs. Perkins, the Librarian, requested
petitioners to leave, Henry Brown said, "What
it the Constitution?" She replied that they had it
he library. She did not take this as a request for
Constitution. Neither Henry Brown nor any of the
r petitioners testified in their defense, so this was
er clarified. Evidently, Henry Brown was trying
ay that the Constitution gave him the right to con-
himself in the manner he was doing.

This case does not involve any denial or due proc-
or any rights given these petitioners under the
l Rights Act of 1964. It simply involves whether
group or any person has the right to use a facility
as a public library room as a place in which to
or make a nuisance of themselves to the extent
the employees of such a facility or those wishing

to make a bona fide use of it are embarrassed and disturbed. Petitioners were not arrested because they were negroes. They were arrested because they stood and sat around in the library after they had been given all the service that they had requested to the extent that their wishes were made known and refused to leave when their business, as stated by Henry Brown, was completed.

CONCLUSION

Neither the facts nor the statute involved in this case presents any substantial federal question and it is respectfully submitted that the petition should be denied.

JACK P. F. GREMILLION,
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1st Assistant
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Clinton, Louisiana.

CERTIFICATE

I, the undersigned, hereby certify that I have this y mailed, postage prepaid, copies of the foregoing sponse to Messrs. Carl Rachlin and Collins, Douglas d Elie, attorneys for Petitioners, at their usual busiss addresses.

Baton Rouge, Louisiana this__________day of ____________________, 1965.

Jack P. F. Gremillion

[illegible] 15 1964

(9)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

HENRY BROWN, ET AL — CIVIL ACTION

vs. — # 2961

JIMMIE H. DAVIS
As Governor of the State of Louisiana
JACK P. F. GREMILLION
As Attorney General of the State of Louisiana
RICHARD KILBOURNE
As District Attorney for The Parish of East Feliciana
J. H. HENRY
As Chairman of the Board of Commissioners
of The Louisiana State Library
MRS. MARCIA PERKINS
As Agent for The Louisiana State Library
MRS. BOB R. JONES, As President, Audubon Regional Library Bd. of Comm.

* *

MOTION TO ADD DEFENDANT

NOW into court through undersigned counsel comes Henry Brown et al and suggests to the court:

1.) That they have filed a complaint seeking to enjoin certain discriminatory practices of the named defendants herein and the Audubon Regional Library and to enjoin certain public officials for the prosecution of a certain criminal charge against them and for other relief.

2.) Mrs. Bob R. Jones, President of the Audubon Regional Library Board of Commissioners was named as a defendant herein and was cited in her capacity as President of the Board of Commissioners of the Audubon Regional Library.

3.) That respondents have filed a Motion to Dismiss based on several grounds, one of which is that the Audubon Regional Library is a corporation and had not been properly named in the complaint or cited and served.

4.) Rule 21 of the Federal Rules of Civil Procedure authorizes the addition of parties by order of court upon motion.

5.) The case of Heard v Ouachita Parish School Board, D.C. La. 1951, 94 F. Supp. 897, supports movers' request. There plaintiff sought a declaratory judgment aginst the local school board and its parish superintendent alleging discrimination in buildings etc., solely because of race or color. The state was not a necessary party, but in view of the power, authority and control vested in the state board of education and state superintendent over school funds, the state board of education and state superintendent were necessary parties and could be made such by amendment.

See See also Green v Brophy 1940, 110F2d, 539, 71 App. D.C. 299. Where it appears that missing indispensable parties are subject to the jurisdiction, leave should be granted to complainant to amend his bill and join the parties.

WHEREFORE, Your mover prays that he be permitted to add as a defendant in this suit the Board of Commissioners of The Audubon Regional Library and that citation and service be had on same through its proper officer.

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BATON ROUGE, LOUISIANA

BY: ______________________

ORDER

IT IS ORDERED that complainants in Civil Action Number 2961 entitled Henry Brown et. al. v. Jimmie H. Davis, et. al. be permitted to add as a party defendant The Board of Commissioners of the Audubon Regional Library and that complainants be permitted service and citation on said defendant through its proper officer.

(SIGNED) E. GORDON WEST

JUDGE

NEW ORLEANS
~~[illegible]~~, LOUISIANA
JUNE 10, 1964.

CERTIFICATE

I, NILS R. DOUGLAS, one of the attorneys of record hereby certify that a copy of the above motion has been sent to Jack P. F. Gremillion, Attorney General of the State of Louisiana by depositing same in the U. S. Mails postage prepaid addressed to Mr. Jack P. F. Gremillion, Attorney General, Baton Rouge, Louisiana.

NILS R. DOUGLAS

SWORN TO AND SUBSCRIBED
BEFORE ME ON THE
DAY OF , 1964.

NOTARY PUBLIC

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 41

HENRY BROWN, WILLIE KELLY, L. C. BIBBINS,
ROBERT SMITH and CLEVELAND McKINZIE,
Petitioners,

vs.

STATE OF LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI TO SUPREME COURT OF LOUISIANA

BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 41

Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith
and Cleveland McKinzie,
Petitioners,

vs.

State of Louisiana,
Respondent.

ON WRIT OF CERTIORARI TO SUPREME COURT OF LOUISIANA

BRIEF FOR PETITIONERS

Opinions Below

what Dist?
Feliciana

The District Court found petitioners guilty, without written opinion. The memorandum opinion of the Supreme Court of Louisiana is unreported and appears in Record, p. 139.

Jurisdiction

The convictions were rendered by the District Court on April 9, 1964. Petitioners' Motion for a New Trial was denied on October 7, 1964. Petitioners' application to the

Supreme Court of the State of Louisiana for Writs of Mandamus, Certiorari and Prohibition was denied by decree of that court made and entered on October 26, 1964. A petition for certiorari was filed in this Court on January 4, 1965. Certiorari was granted on May 3, 1965.

The jurisdiction of this Court in this case is invoked pursuant to Title 28, United States Code, Section 1257 (3).

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment First:

> "Congress shall make no law . . . abridging the freedom of speech . . . or of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment Fourteen, Section 1:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Civil Rights Act of 1964, Title III, Designation of Public Facilities:

> "Sec. 301 (a) Whenever the Attorney General receives a complaint in writing signed by an individual to the effect that he is being deprived of or threatened with the loss of his right to the equal protection of the laws, on account of his race, color, religion, or national origin, by being denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any state or subdivision thereof, other than a public school . . ."

Louisiana Revised Statutes of 1950, Title 14, Section 103.1, Disturbing the Peace:

A. Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby:

> (1) crowds or congregates with others, providing however nothing herein contained shall apply to a bona fide legitimate labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions, in or upon a shore protection structure or structures, or a public street or public highway, or upon a public sidewalk, or any other public place or building, or in any hotel, motel, store, restaurant, lunch counter, cafeteria, sandwich shop, motion picture theatre, drive-in, beauty parlor, swimming pool area, or any sports or recreational area or place, or any other place of business engaged in selling or serving members of the public, or in or around any free entrance to any such place of business or public building, or to any building owned by another individual, or a corporation, or a partnership or an association, and who fails or refuses to disperse and move on, or disperse or move on, when ordered so to do by any law enforcement officer of any municipality, or parish, in which such act or acts are committed, or by any law enforcement officer of the state of Louisiana, or any other authorized person, or
>
> (2) insults or makes rude or obscene remarks or gestures, or uses profane language, or physical acts,

or indecent proposals to or toward another or others, or disturbs or obstructs or interferes with another or others, or

(3) while in or on any public bus, taxicab, boat, ferry or other water craft or other vehicle engaged in transporting members of the public for a fare or charge, causes a disturbance or does or says, respectively, any of the matters or things mentioned in sub-section (2) supra, to, toward, or in the presence of any other passenger on said vehicle, or any person outside of said vehicle or in the process or boarding or departing from said vehicle, or any employee engaged in and about the operation of such vehicle, or

(4) refuses to leave the premises of another when requested so to do by any owner, lessee, or any employee thereof, shall be guilty of disturbing the peace.

B. Whoever commits the crime of disturbing the peace as defined herein shall be punished by a fine or not more than two hundred dollars, or imprisonment in the parish jail for not more than four months, or by both such fine and imprisonment. Added Acts 1960, No. 69, §1.

Questions Presented

Petitioners, all residents of East and West Feliciana Parishes, Louisiana, were arrested and convicted on charges of disturbing the peace under a Louisiana statute R. S. 14:103.1 for their failure to vacate a public area of the Audubon Library Building, a library operated by the three parishes of East Feliciana, West Feliciana and St. Helena, jointly, in the Town of Clinton, Louisiana, after being requested to leave by the librarians and by the sheriff. The evidence showed that petitioners had entered the library to use the facilities available to the public. No evidence that petitioners were loud or boisterous or that any breach of the peace occurred was offered. Evidence was presented, however, showing that petitioners, all Negroes, were asked to leave, although not disorderly, because it was the policy of the library not to permit Negroes to use that building.

Did the arrest and conviction of the petitioners deprive them of rights protected by

(1) The Due Process clause of the Fourteenth Amendment to the Constitution of the United States in that they were convicted without any evidence of the essential elements of the crime;

(2) The Due Process clause of the Fourteenth Amendment in that they were convicted under a statute which, as interpreted, was so vague and indefinite as to afford no ascertainable standard of criminality;

(3) The Due Process and Equal Protection clauses of the Fourteenth Amendment in that their arrests and convictions constituted enforcement of racial segregation;

(4) The First Amendment, as made applicable to the states through the Fourteenth Amendment, in that petitioners' freedom of expression has been abridged;

(5) Title III of the Civil Rights Act of 1964 in that such arrests and convictions constitute an attempt to punish petitioners for exercising their right to be free of discrimination?

Statement of the Case

On March 7, 1964, about 11:30 A. M., petitioners, all Negroes, entered the public reading room of the Audubon Regional Library in the town of Clinton, Louisiana. The library is jointly operated by three Parishes and is supplied, in part, by the Louisiana State Library.

It maintains three branches and two Bookmobiles as its "points of service" (R. 103, 109, 114-115). The Red Bookmobile services the white residents and their schools. The Blue Bookmobile operates in the Negro area and services the Negro residents and their schools (R. 109, 115, 128-129, 137).

To use the library, a person must be a "registered borrower" (R. 111). All Negroes are registered through the Blue Bookmobile by the Negro librarian in charge (R. 128-129, 137-138). A card is then issued with the word "Negro" stamped on it (R. 137). White persons cannot use the Blue Bookmobile to register or check out a book. They are referred to the nearest Branch or to the Red Bookmobile (R. 137-138).

At no time can a Negro pick up (R. 95, 98) or return (R. 112, 114, 116) a book at the Audubon Regional Library. Petitioner Brown was told that his book would be mailed or he could pick it up at the Blue Bookmobile (R. 95, 98). To return the book, he was to mail it or bring it to the Blue Bookmobile (R. 112, 114, 116).

Never before March 7, 1964 had a Negro been seen at the Audubon Regional Library, although it has been in existence since 1961 (R. 102). Neither the librarian (R.

120) nor the sheriff (R. 132) had ever seen a Negro enter the library.

After petitioners entered the library, Petitioner Brown requested a book. Brown was told by the librarian that the book was not available, and she would have to be sent for it (R. 95).

Moments later, petitioners were told to leave. The Assistant Librarian "assumed" they would leave because she did not have the book (R. 96). After a second demand, she called in the Regional Librarian (R. 103) who also told petitioners to leave. Petitioners, in response to these requests, remained in the reading room (R. 96, 121). They said nothing and did nothing (R. 96). At no time were they noisy or boisterous (R. 97, 121).

Testifying that she was "disturbed" by the presence of petitioners (R. 126-127), the Regional Librarian offered no evidence as to what it was that petitioners did to cause her to be disturbed. ~~Her concern was not communicated to anyone present at the time.~~ In fact, no one objected to any activity of petitioners other than their presence in the reading room.

About 9:00 that morning, the sheriff was notified by his deputy that "something" was going to take place at the library (R. 117-118). He was not called, however, by either librarian or anyone at the library (R. 107, 131). All morning the sheriff watched and waited for petitioners, until he finally saw them come down the street (R. 117) and enter into the library (R. 118). He immediately called his deputies (R. 118-119, 131) and dispatched them to the library

A.M.

building. The sheriff stated that he and his deputies arrived there approximately five minutes after petitioners (R. 131).

Petitioners were seeking by their acts, the sheriff testified, to effect a change of the policy of segregation in the Audubon Regional Library (R. 118). Prior to arresting petitioners, however, the Sheriff did not directly ascertain whether petitioners intended to use the facilities at the library building (R. 122-123). Only after petitioners were taken to jail did the Sheriff ask them why they were at the library (R. 118). Before this time, he had no conversation with petitioners (R. 120).

After the librarians told the Sheriff they had ordered petitioners to leave the building, the Sheriff also demanded that they leave (R. 116). He presented them with the choice of leaving the building or being arrested (R. 117, 121).

When petitioners indicated they would not leave, they were arrested (R. 117). They were not arrested, however, because their actions were considered a demonstration (R. 120). Having made no noise (R. 121), their disturbance consisted solely of their refusal to leave the library (R. 121). Their subsequent arrest was entirely due to petitioners' refusal to obey the demands of the librarians or the Sheriff.

A Bill of Information was filed by the District Attorney on March 11, 1964, and petitioners appeared for trial on March 24, 1964. The trial was completed on April 9, 1964.

At the outset of the trial petitioners moved to quash the Bill of Information on the grounds (a) that the Bill did not ⓝ inform petitioers of the crimes of which they were accused, (b) that the statute referred to therein was unconstitutional for vagueness, (c) that the statute and Bill fail to allege criminal or specific intent, (d) that the Bill and prosecution violate the First and Fourteenth Amendments to the Constitution of the United States by depriving petitioners of freedom of assembly and equal protection of the laws, and (e) that the statute and Bill represent an unlawful delegation of legislative powers.

Petitioners' Motion to Quash was denied, as was petitioners' demand for certain particulars regarding the elements of the offense charged by the State (R. 69).

The District Court found all petitioners guilty as charged (R. 139). On July 14, 1964 petitioners timely moved for a new trial on the ground that no evidence existed in the record to support the judgment. This motion was denied on the same day and the petitioners were thereupon sentenced as follows:

> Petitioner Brown; $150 and costs, and in default of payment of the fine, 90 days in the parish jail.
>
> Petitioners Kelly, Bibbins, Smith and McKinzie; $35 and costs, and in default of payment of the fine, 15 days in the parish jail. (R. 3)

On July 28, 1964 nine separate Bills of Exceptions were filed relating to rulings of the District Court, including the denials of the demands for particulars, the Motion to Quash and the Motions for a New Trial (R. 8-32). Per curiam opinions with regard to the nine Bills of Exceptions were rendered by the District Court on October 7, 1964 (R. 8-32).

Pursuant to a Notice of Application for Supervisory Writs filed on July 28, 1964, petitioners sought review by the Supreme Court of Louisiana of the judgment of conviction and sentence (R. 8-32). Under Louisiana law no direct appeal procedure was available, since the fines imposed were less than $300 and the jail terms less than six months. Writs of mandamus, certiorari and prohibition were sought under the general supervisory jurisdiction of the Supreme Court of Louisiana (Louisiana Constitution, Article VII, Section 10) and in accordance with Rule 12 of the Louisiana Supreme Court Rules.

On October 26, 1964, the Supreme Court of Louisiana unanimously denied petitioners' applications for writs of mandamus, certiorari and prohibition, holding that there was no error in any of the rulings and judgment of the District Court (R. 32). On October 28, 1964 bench warrants were issued by the District Court to effect execution of the sentences imposed upon petitioners. The District Court then adjourned until November 2, 1964.

On October 28, 1964 petitioners filed a petition with the Supreme Court of Louisiana for stay of execution of sentences, requesting 90 days to enable petitioners to file a Petition for Writ of Certiorari with this Court (R. 33-36). Initially petitioners were refused the stay, being advised that such stays would thereafter be issued only by the District Court. Petitioners Smith and McKinzie were arrested pursuant to the District Court's bench warrants on October 30, 1964.

On November 2, 1964 petitioners applied to the District Court for a stay of execution pending preparation of their petition to this Court for a Writ of Certiorari. The application for a stay was denied that same day (R. 46). On

November 4, 1964 (following the Election Day holiday when the courts were closed) petitioners again applied to the Supreme Court of Louisiana for a stay, or alternatively for writs of habeas corpus and mandamus (R. 37-44). At that point the petitioners' first petition, which had been filed on October 28, 1964, was granted, but the stay of execution of the sentences was limited to a period of thirty days from November 4th. The stay was subsequently extended for an additional thirty days, expiring on January 4, 1965.

How Federal Questions Were Raised

The Federal questions presented here were ~~was~~ raised in the District Court by written Motion to Quash (R. 12-14) and written Motion for a New Trial (R. 31-32) and by written Bills of Exceptions to the denial of such motions (R. 8-32), and in the Supreme Court of Louisiana by application for Writs of Mandamus, Certiorari and Prohibition (R. 3-6).

Petitioners accordingly raised their Federal claims at the earliest opportunity and renewed them at each stage of the proceedings below.

Reasons for Granting the Writ

The convictions below conflict with applicable decisions of this Court on important constitutional issues. If the (s) convictions be upheld on the facts in this record, statutes such as these ~~we have before us~~ can effectively be utilized to circumvent and nullify constitutional rights reaffirmed by the Civil Rights Act of 1964.

ARGUMENT

POINT I

The convictions below violate Constitutional guarantee of due process of law.

A. The Convictions Below Were Totally Unsupported by the Evidence

The material facts of this case virtually duplicate those in *Taylor* v. *Louisiana,* 370 US 154, 82 S. Ct. 1188 (1962), in which this Court held that a conviction of disturbing the peace could not be upheld under L. S. A. R. S. Sec. 14:103.1 (the same statute under which this conviction was rendered) if the only evidence was that petitioners "were violating a custom that segregated people in waiting rooms". The "mere presence" of Negroes in a white waiting room is not likely to give rise to a breach of the peace. 370 US 154, 155. In effect such evidence without more constitutes no evidence of disturbance of the peace, and the conviction falls under the rules of *Thompson* v. *Louisville,* 362 US 199, 204, 206, where the court held that a conviction in a state court must be set aside "if there is no support for these convictions" or "the record is entirely lacking in evidence to support any of the charges," or is "without evidence of his guilt." Not present here is a statement common to many similar trials that the on-looking whites seemed disturbed.

~~As much~~ as is the waiting room of an interstate bus sta~~tion,~~tion. Taylor v. Louisiana, supra. ~~t~~The reading room of a public library is as clearly an area in which racial segregation cannot be enforced. See also *Wright* v. *Georgia,* 373~~,~~ US 284, where six Negro petitioners were peacefully playing basketball in a public park, and the

can be rewritten more strongly

court found no evidence of any activity which might be thought to violate a breach of the peace statute; *Mayor and City Council of Baltimore City* v. *Dawson,* 350 US 877, where city could no longer enforce racial segregation in enjoyment of public beaches and bathhouses; *Holmes* v. *Atlanta,* 350 US 879; where city was restrained from denying Negroes the right to use the public golf course; *Gayle* v. *Browder,* 352 US 903, where city could no longer require segregation on motor buses, *New Orleans City Park Improvement Asso.* v. *Detiege,* 358 US 54 where municipality was enjoined from denying Negroes use of the park facilities.

There is no explanation sentence

No ground for the District Court's decision other than that petitioners, Negroes, chose to remain quietly in the public area of the library after being asked to leave (R. 140). The record is bare of proof of any activity which supports a finding that there was any other element of the crime charged. The entire findings of fact by the District Court are as follows:

> "The evidence clearly shows that these 5 men went into the library, that they asked for a book and were served, at least their order was taken. Of course, the library at that time, being occupied only by two female library-workers, they then asked the parties to leave. This was done twice, and finally the Sheriff again asked them to leave . . ."
>
> "Clearly the evidence shows that these parties did not congregate when they came to the town of Clinton to the Audubon Parish Library, merely for the purpose of seeking service; that they had a specific motive and a specific intent, and that was, as was shown beyond any reasonable doubt, to refuse to

> leave the library even after they had been served, and after they had been requested three times." (R. 140)

Louisiana statute 14:103.1 requires proof of an intent to provoke a breach of the peace or acts "under circumstances such that a breach of the peace may be occasioned." The Sheriff, by his own testimony, stated that he never ascertained the facts regarding either element of the crime as defined by the statute (R. 119-121). He did not know of his own knowledge nor did anyone communicate to him facts indicating whether or not petitioners intended to provoke a breach of the peace or that a breach of the peace might be occasioned by their conduct. No proof of an intent to disturb the peace can be inferred from the fact that petitioners may be members of the Congress of Racial Equality, an organization to test and eliminate racial discrimination. See *Taylor* v. *Louisiana,* 370 US 154, 156 (1962), where evidence was offered to show that the demonstration was part of a "preconceived plan" and this Court stated that such evidence had no bearing on whether there could be a conviction for disturbing the peace. The mere assertion that the Regional Librarian felt "disturbed" by the presence of Negroes in the branch library thereto reserved for white persons can not support such a finding. *Wright* v. *Georgia,* 373 US 284, 292-293 and *Taylor* v. *Louisiana,* 370 US 154.

Sentiment

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B. The Elements Necessary to Establish a Breach of the Peace Under Louisiana Law Were Carefully Analyzed by This Court in *Garner v. Louisiana,* 368 US 157, 82 S. Ct. 248

In *Garner* Negroes took seats at lunch counters where only white persons customarily were served, and they remained quietly in their seats after being told they could not be served there. This Court found "The record~~s~~ is barren of any evidence that would support a finding that petitioners' conduct would even 'foreseeably' have disturbed the public." 368 US 157, 166. No~~-issue~~ ~~w~~as to the right of petitioners to seek service in the public library ~~can exist.~~ Accordingly, ~~the issue raises~~ no question~~s~~ of trespass, and ~~is that much sharper as to~~ the illegality of the arrest and the subsequent conviction, is that much clearer.

There is and can be no question

~~There~~ is

Constitutional

~~words~~

meaning

poorly written -

At the time of the arrests, there were in the library only the five petitioners, two members of the library staff, the Sheriff and two or more deputies (R. 116). No evidence tending to show likelihood of any disturbance of any kind (R. 126-127) was offered. No one exhibited any concern or agitation. There was no noise—the only conversation appeared to be that resulting from the statements of the librarians and the Sheriff and the answers of one petitioner to their questions (R. 97, 121-122). Not even the barest indications of an imminent breach of the peace were present. *Cantwell* v. *Connecticut*, 310 US 296. The Sheriff testified flatly that the sole element constituting grounds for the arrest of the petitioners was their refusal to leave when ordered to do so by him (R. 121). No ascertainable reason for demanding that petitioners leave the library exists (other than their color), and no reason in law or fact~~s~~ exist~~s~~ed for their subsequent arrest.

C. The Louisiana Statute as Applied to These Petitioners Was Vague, Uncertain and Indefinite

Were this Court to assume, *arguendo,* that Sec. 14:103.1, in requiring only that an accused's conduct take place "under circumstances such that a breach may be occasioned thereby,'' removes the necessity of determining that such conduct could ''foreseeably disturb or alarm the public,'' it might be argued that even though the facts here do not meet the standards enunciated in *Garner* v. *Louisiana,* the new statute's less rigorous standards have been met. But to accept this argument would in effect admit that the new statute fails to specify any ascertainable standard of criminality. Read in this manner, Sec. 14:103.1 placed upon the ordinary citizen the burden of guessing whether a breach of peace might be occasioned by any given set of circumstances, regardless of whether such result is reasonably foreseeable at the time. Some spectators ~~to one's presence,~~ timid souls, might be easily alarmed; others, heartier by nature, might not become apprehensive so quickly at the sight of a Negro in a ''white only'' library. To require ~~one~~ to speculate as to the consequences of ~~one's~~ his presence, is to place ~~one~~ him at the mercy of irrationality and deprive ~~one~~ him of life, liberty and property without due process of law. Speech, and its free exercise, is rendered into the tender hands of the know-nothing. See *Lanzetta* v. *New Jersey,* 306 US 541, 543; *United States* v. *L. Cohen Grocery,* 225 US 81, 89; *Connally* v. *General Construction Co.,* 269 US 385, 591. In no way can the facts in this case be compared with *Cox* v. *Louisiana,* 379 US 536. Nor is there any question here of the reasonable nature of any regulation directing the time and place for the use of these facilities. So far as these appellants are concerned, Negroes all, the ban was absolute.

a Negro person or any other person

~~in a public lib~~

what facts

sel – [illegible]

By enacting Sec. 14:103.1 the State of Louisiana has attempted to abandon the fixing of any standard of criminality. Where a statute so vaguely worded is used to punish conduct—such as the use by persons of public facilities to which they have a constitutionally protected right—the statute must be held unconstitutionally vague, uncertain and indefinite. *Wright* v. *Georgia*, 373 US 284, 293; *Winters* v. *New York*, 333 US 507.

POINT II

The convictions below constitute enforcement of racial segregation in violation of Constitutional guarantees of equal protection of the laws and statutory guarantees of freedom from punishment for exercising rights to non-segregated use of facilities.

The evidence below clearly delineates the pattern of segregation which characterized the operations of the Audubon Regional Library (R. 98, 120, 132, 137). Elaborate rules regarding the correct "point of service" for users of the library effectively segregated Negroes to the "Blue Bookmobile" (R. 109-110, 112, 115-116). Only persons registered at a specified "point of service" were afforded access to browsing and reference shelves and other reading room facilities at such "point of service" (R. 111-112, 128-129). Registration cards issued at the Blue Bookmobile were stamped with the word "Negro" and white persons were not registered there (R. 137).

Against this pattern of segregation of facilities the arrest and conviction of the petitioners takes on added significance.* The Constitution of the United States forbids enforcement of segregation of public facilities. *Brown* v. *Board of Education,* 347 US 483, 495. To continue the effects of segregation through the use, by public officials, of vaguely worded statutes can only undermine the substance of the holdings of this Court supportive of constitutional guarantees to equal protection of the laws.

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* Interestingly, the Trial Court claimed this trial was a simple "breach of peace" case (R. 112) with no segregation overtones; nevertheless after the District Attorney expended the first 58 pages of the transcript in an attempt to show CORE's involvement.

Before us we have a record making clear that the conviction of petitioners had as its primary purpose the deterrence of Negroes from using the "white" library facilities theretofore denied to them. Such a purpose is clearly in conflict with the Constitution. Absent a showing of independent criminal activity, the convictions constitute an unconstitutional attempt to enforce segregation by the State of Louisiana and accordingly should not be allowed to stand. See *Garner* v. *Louisiana,* 368 US 157, 181.

POINT III

Petitioners having presented themselves peacefully, the convictions below constitute a denial of petitioners' rights of freedom of expression and assembly and constitute a denial of the right to redress a public grievance.

The evidence below shows that petitioners were not only engaged in an attempt to seek to use the public utilities of the Audubon Regional Library, but that they were also engaged quietly in protesting the illegal segregation policies and practices of that library and thereby to seek the correction thereof (R. 85-88, 91-92, 117-118, 130). Indeed, the State's case appeared to be predicated on the theory that this activity alone constituted a material element of the criminal activity charged (R. 77-78). A conviction based on such grounds would clearly be in conflict with the Due Process Clause of the Fourteenth Amendment as it guarantees the First Amendment protection of freedom of expression and assembly. *Edwards* v. *South Carolina,* 372 US 229; *Garner* v. *Louisiana,* 368 US 157, 201-204 (concurring opinion); *NAACP* v. *Alabama,* 357 US 449, 461.

To have left the library at the direction of the Sheriff would have meant succumbing to an illegal police order. While there are risks attendant upon disobeying a police order, to make it a crime to disobey any police order no matter how wrongful, not only is to give in to injustice, but to participate in the installation of a police state. It is only in the police state that the refusal to obey a police order is a crime by itself. No act, even remotely improper exists before us except the refusal to obey the Sheriff, the very Sheriff who came to the library either to expel them, or arrest them. What honorable alternative does a man have at this juncture? If a man cannot stand peacefully in a public library without risking arrest where then is he safe? The arrest here had nothing to do with the maintenance of law and order, but occurred merely to retain the old order and to continue the denial of the constitution of the United States to Negroes in Louisiana.

very good

POINT IV

Had these acts occurred on or after July 2, 1964, arrests therefore would have been improper under Title III of the 1964 Civil Rights Act; accordingly the convictions should be abated.

In seeking to use the public reading room and other facilities of the Audubon Regional Library on a non-discriminatory and non-segregated basis, petitioners were engaging in an activity which would be protected under the Civil Rights Act of 1964 had it been in effect. Accordingly, at this time, the convictions are in conflict with the provisions of that Act (Title III) and the prosecutions should be abated, the judgment vacated and the charges dismissed. *Hamm* v. *Rock Hill,* 379 US 306; *Bell* v. *Maryland,* 378 US 226, 84 S. Ct. 1815.

The acts complained of were certainly not evil in themselves, but at worst *arguendo,* merely wrongful because of the official maintenance of segregation and upholding of such practice by the usage of the White community. Since national policy on the use of public facilities is made clear beyond a peradventure by Title III, and since this application to this Court is part of the procedure on appeal of this case, the judgments of conviction are not yet final and accordingly such judgments should be abated and the bills of information dismissed. That the convictions were procured under state statutes by state courts is of little interest since we are here concerned with national policy protecting the peaceful use (as is the fact here) of public facilities.

CONCLUSION

The conviction of petitioners below is unsupported by any evidence and was made pursuant to a statute unconstitutionally vague and uncertain. The conviction represents an attempt to use State power to enforce illegal racial segregation and denies petitioners their rights to ~~the~~ freedom~~s~~ of expression and assembly. For all of these reasons the conviction, and the decree of the Supreme Court of Louisiana upholding the conviction, and ~~constitute state court decisions of substantial federal questions which are~~ not in ~~accord with applicable decisions of this Court~~. Should be reversed.

It is respectfully submitted that the petition should be granted.

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Brown, Henry et al vs Louisiana, Feb. 1966 - April, 1966
Clinton Library Case, Part II

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1965

No. 41

HENRY BROWN, ET AL., PETITIONERS,

vs.

LOUISIANA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR CERTIORARI FILED JANUARY 4, 1965
CERTIORARI GRANTED MAY 3, 1965

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 41

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IN THE SUPREME COURT OF THE STATE OF LOUISIANA

Filed September 13, 1964

Hugh S. Paul
Deputy Clerk.

No. 47496

State of Louisiana

versus

Henry Brown et al.

In Re Henry Brown et al.

Applying for writs of mandamus, certiorari and prohibition.

Robert F. Collins, Nils R. Douglas, Lolis E. Elie, Murphy W. Bell, Attorneys for Relator.

Richard Kilbourne, Attorney for Respondents.

[fol. 4]

IN THE SUPREME COURT OF LOUISIANA

Number ....

State of Louisiana, Appellee

vs.

Henry Brown et al., Appellants

STATEMENT OF THE CASE

On March 7, 1964 at about 11:15 A.M., five young Negro males went into the Clinton Branch of the Audubon Regional

Library to check out some books. Henry Brown asked for a book and the assistant librarian, Mrs. Katie Reeves, checked the card catalogue, found out that the book was not there and told Henry Brown so. He was also told that the State Library would be asked for the book and that he would be notified when it came. Henry Brown then asked if he could see a copy of the Constitution of the United States, and he was told that there were no copies in the library. Mrs. Reeves, on the trial of this matter, testified that she assumed the defendants would leave when they were told the books they wanted were not available, but they didn't. She then asked them to leave and they refused. Mrs. Perkins, the Regional Librarian, was called, and she asked the defendants to leave, which they refused to do. No one said anything but Henry Brown. The defendants were not loud or noisy, nor were there any fights, crowds or angry words to cause the defendants to be asked to leave.

About this time, Sheriff Arch V. Doughty and a couple of deputies arrived at the library. He was told what had transpired and he asked the defendants to leave. They refused. Henry Brown told the sheriff that it was a public library and he wanted service there. The other four persons were asked if they too (Besides Brown) did not intend to leave, and they indicated that they didn't. The defendants [fol. 5] were then arrested and charged with violation of L.S.A.-R.S. 14:103.1.

They were tried on March 25, 1964 and found guilty. Henry Brown was sentenced to pay $150 and costs and in default of the fine to spend 90 days in the parish jail. The other four defendants were sentenced to pay $35 and costs and in default of the fine to spend 15 days in the parish jail.

[fol. 6]

IN THE SUPREME COURT OF LOUISIANA

Number ....

STATE OF LOUISIANA, Appellee

vs

HENRY BROWN et al., Appellants

APPLICATION FOR WRITS OF MANDAMUS, CERTIORARI, AND PROHIBITION AND INVOLVING THE GENERAL SUPERVISORY JURISDICTION OF THE HONORABLE SUPREME COURT OF THE STATE OF LOUISIANA OVER THE TWENTIETH JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF EAST FELICIANA, STATE OF LOUISIANA, THE HONORABLE JOHN R. RARICK PRESIDING—Filed July 28, 1965

The petition of the State of Louisiana on the relation of Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith and Cleveland McKinzie, defendants and appellants herein, applying for writs of Mandamus, Certiorari, and Prohibition and invoking the general supervisory jurisdiction of the Honorable Supreme Court of the State of Louisiana over the Twentieth Judicial District Court of the Parish of East Feliciana with respect represents:

1. That the jurisdiction of the Honorable Supreme Court of the State of Louisiana is invoked under Article 7, Section 10 of the Constitution of the State of Louisiana and in accordance with rule 12 of the rules of the Supreme Court of the State of Louisiana.

2. That this is an unappealable case, the same being a misdemeanor in which the penalties imposed were:

a. Henry Brown $150 and costs, and in default of payment of the fine, 90 days in the parish jail.

b. Willie Kelly, L. C. Bibbins, Robert Smith and Cleveland McKinzie each to pay a fine of $35 and costs and in default of the payment of the fine, 15 days in the parish jail.

[fol. 7] 3. That the appellants herein were charged in bill of information Number B-4420 with violation of L.S.A.-R.S. 14:103.1 relative to "Disturbing the Peace" as set forth in said bill of information a certified copy of which is attached hereto and made a part hereof as is copied in extenso.

4. That before entering on the trial of this matter, your defendants filed an application for a Bill of Particulars and that on March 25, 1964, the Court overruled and denied a portion of said application. That defendants timely objected and timely reserved a bill of exception making the application, the state's answer, and the ruling of the Court all a part of the bill of exception. Attached hereto and made a part hereof is the application for Bill of Particulars and the answer of the state thereto.

5. That before entering on the trial of this matter, your defendants filed a Motion to Quash and that on March 25, 1964, the Court overruled and denied the Motion to Quash. That defendants timely objected and timely reserved a bill of exception making the motion and the ruling of the Court all a part of the bill of exceptions. Attached hereto and made a part hereof is the Motion to Quash.

6. That during the trial of the matter herein, and during the examination of Miriam Feingold, a witness called by the state, an objection was made to a line of questioning as being irrelevant and immaterial. The Court overruled this objection and defendants timely objected and timely reserved a bill of exceptions making the questions, the objection and the ruling of the Court all a part of the bill of exceptions. This bill of exceptions Number 3 is attached hereto and made a part hereof.

7. That during the trial of the matter herein and also during the testimony of Miriam Feingold, a witness called by the state, an objection was made to a line of questioning on the grounds that a sufficient predicate had not been laid

[fol. 8] for the questions. The Court overruled this objection and defendants timely reserved a bill of exceptions making the questions, the objections and the ruling of the Court all a part of the bill of exceptions. This bill of exceptions Number 4 is attached hereto and made a part hereof.

8. That during the trial of the matter herein, and again during the testimony of Miriam Feingold, a witness called by the state, an objection was made to the relevancy of the questions. The objection was overruled and defendants timely reserved a bill of exceptions making the questions, the objection and the ruling of the Court all a part of the bill of exceptions. This bill of exceptions Number 5 is attached hereto and made a part hereof.

9. That during the trial of the matter herein and during the cross examination of Mrs. Marshall Perkins, a witness called by the State, she was asked a question which was objected to by the state. The Court sustained the state's objection and a timely bill of exceptions was reserved making the question, the objection of the state and the ruling of the Court all a part of the bill of exceptions. This bill of exceptions Number 6 is attached hereto and made a part hereof.

10. That during the trial of the matter herein and during the cross examination of Mrs. Marshall Perkins, a witness called by the state, she was asked a question to which the state objected. The Court sustained the state's objection and defendants timely excepted making the question, the objection of the state and the ruling of the Court all a part of the bill of exceptions. This bill of exceptions Number 7 is attached hereto and made a part hereof.

11. That during the trial of the matter herein and during the cross examination of Sheriff Arch V. Doughty, a witness called by the state, he was asked a question to which the [fol. 9] state objected. The Court sustained the state's objection and defendants timely excepted making the question, the objection and the ruling of the Court all a part of the

bill of exceptions. This bill of exceptions Number 8 is attached hereto and made a part hereof.

12. That at the conclusion of the trial of this matter, defendants were all found guilty. On a subsequent day of Court and before judgment was entered on said verdict and before any sentence had been imposed, defendants filed a motion for a new trial. The Court overruled the Motion For A New Trial and defendants timely excepted making the motion, the ruling of the Court and the entire record all a part of the bill of exceptions. This bill Number 9 is attached hereto and made a part hereof.

13. That defendants have exhausted all of their remedies in the Court of original jurisdiction, no appeal lies from the conviction and sentence imposed, hence relief is requested of this Honorable Court.

Wherefore, appellants pray that this application for Writs of Mandamus, Certiorari, and Prohibition be granted and for all orders necessary and for general and equitable relief.

Robert F. Collins, Nils R. Douglas, Lolis E. Elie,
2211 Dryades Street, New Orleans, Louisiana, By:
……………………………………………………………;
Murphy W. Bell, 971 South 13th Street, Baton
Rouge, Louisiana.

[fol. 10]
State of Louisiana
Parish of Orleans

Before Me, the undersigned authority, personally came and appeared: Nils R. Douglas, who after first being by me duly sworn did depose and say that he is one of the attorneys for appellants herein, that he prepared the above petition and all the allegations therein contained are true and correct to the best of his knowledge, information and belief; that type written notice of intent to apply for writs of Prohibition, Mandamus and Certiorari was filed in open Court on the 28th day of July, 1964, and that copy of the foregoing petition has been served on the Judge and District Attorney by mail, postage prepaid at the Twentieth Judicial District Court, Clinton, Louisiana.

Nils R. Douglas

Sworn to and subscribed before me this day of , 1964.

....

Notary Public

[fol. 11]

ATTACHMENT TO APPLICATION

Bill of Information

STATE OF LOUISIANA

TWENTIETH JUDICIAL DISTRICT

PARISH OF EAST FELICIANA

Richard Kilbourne, District Attorney of the Twentieth Judicial District of the State of Louisiana who, in the name and by the authority of the State prosecutes in this behalf, now comes into the Twentieth Judicial District Court, in and for the Parish of East Feliciana, in said State, on this the 11th day of March in the year of our Lord, One Thousand Nine Hundred and sixty-four, and with leave of the Court first had and obtained, gives said Court here to understand and be informed that one Henry Brown, one Willie Kelly, one L. J. Bibbins, one Robert Smith and one Cleveland McKinzie, late of the Parish of East Feliciana, within the body of the Parish of East Feliciana on or about the 7th day of March in the year of Our Lord, One Thousand Nine Hundred and sixty-four, violated R.S. 14:103.1, relative to disturbing the peace, in that, with the intent to provoke a breach of the peace and under circumstances such that a breach of the peace might be occasioned thereby, they congregated together in the Audubon Library building in the

Town of Clinton, Louisiana and did then and there fail to and refuse to leave said premises when ordered to do so by Mrs. Marcia Perkins, who was then and there in lawful charge of said premises and did further refuse and fail to leave said premises when ordered to do so by Arch V. Doughty, Sheriff of the Parish of East Feliciana, contrary to the form of the Statutes of the State of Louisiana in such cases made and provided against the peace and dignity of the same.

District Attorney of the Twentieth
Judicial District of the State of
Louisiana.

[fol. 12]

ATTACHMENT TO APPLICATION

No. B-4420

20TH JUDICIAL DISTRICT COURT

PARISH OF EAST FELICIANA

STATE OF LOUISIANA

STATE OF LOUISIANA

vs.

HENRY BROWN, WILLIE KELLY, L. C. BIBBINS,
ROBERT SMITH and CLEVELAND MCKINZIE

BILL OF EXCEPTION NUMBER 1

BE IT REMEMBERED that before entering on the trial of this case your defendants, having heard the bill of information read and protesting that they were not guilty of the offense set out therein filed the following application for a bill of particulars:

Now into Court, through undersigned counsel, come Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith and

Cleveland McKinzie, made defendants in the above numbered and entitled matter and protesting that they are not guilty of the crimes charged, plead that they are unable to properly defend themselves until they are furnished a Bill of Particulars upon the following, to-wit:

1. Where were the defendants arrested?

2. Who arrested the defendants?

3. At what time were the defendants arrested?

4. Who ordered the arrest of the defendants?

5. Who else was present when the defendants were arrested?

6. Does the State contend that the mere presence of the defendants in the Audubon Library building violated L.S.A.-R.S. 14:103.1?

7. Does the state contend that the public is not generally invited to use the facilities and resources of the Audubon Library building in the Town of Clinton?

WHEREFORE, the applicants pray that the State of Louisiana through the District Attorney, Parish of East Feliciana be ordered to show cause on a day and at a time certain why the said Bill of Particulars, as requested above, should not be furnished and served upon your applicants, defendants herein, and all other relief as they may be entitled.

Of Counsel:

CARL RACHLIN
280 Broadway
New York, New York

FLOYD B. MCKISSICK
213½ W. Main Street
Durham, North Carolina

By Attorneys:

ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE
2211 Dryades Street
New Orleans, Louisiana

MURPHY W. BELL
971 South 13th Street
Baton Rouge, Louisiana

By: ....
MURPHY W. BELL

[fol. 13]
STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally appeared:

MURPHY W. BELL

one of the attorneys for the accused in the above entitled and numbered cause, who, after being duly sworn did depose and say that he has read and prepared the foregoing application; that all of the allegations of fact are true and correct, and that this application was not filed for purposes of delay.

....
MURPHY W. BELL

SWORN TO AND SUBSCRIBED BEFORE ME,
THIS DAY OF MARCH, 1964.

....
Notary Public

ORDER

Considering the foregoing, IT IS ORDERED that District Attorney Richard Kilbourne show cause on the .... day of ...., 1964, at .... o'clock .....M., why the foregoing application for Bill of Particulars should not be granted as prayed for.

CLINTON, LOUISIANA, ..., 1964.

....
Judge

That on March 25, 1964 a hearing was had contradictorily with the State on the said Application for Bill of Particulars.

That on March 25, 1964 the court overruled and denied a portion of the said Application for Bill of Particulars to which your defendants then and there objected and reserved a bill of exceptions making a part of the bill of exceptions the application for the Bill of Particulars, the answer of the District Attorney and the ruling of the court all a part of the formal bill.

[fol. 14] That defendants first submitting this his formal bill of exceptions to the District Attorney now tenders the same to the Court and prays that the same be signed and sealed by the Judge of this Court pursuant to the statute in such case made and provided which is done accordingly this 7th day of October, 1964.

/s/ John R. Rarick
Judge

[fol. 15]

No. B-4420

20th Judicial District Court
Parish of East Feliciana
State of Louisiana

State of Louisiana
vs.
Henry Brown, Willie Kelly, et al.

Per Curiam to Bill of Exceptions Number 1

The State voluntarily answered numbers 1 through 5 of defendants' application for a bill of particulars but refused number 6 and 7 on the grounds the information was irrelevant.

The Court after listening to the argument felt that the information was explicit in setting forth the offense charged, the language of the statute was tracked and the defendants were adequately informed of the state's contention against them. Thus the reason for the overruling the application for a bill of particulars as to questions 6 and 7.

Clinton, Louisiana this 7th day of October, 1964.

John R. Rarick, Judge.

Duly sworn to by Nils R. Douglas, jurat omitted in printing.

[fol. 16]

ATTACHMENT TO APPLICATION

No. B-4420

20TH JUDICIAL DISTRICT COURT

PARISH OF EAST FELICIANA

STATE OF LOUISIANA

STATE OF LOUISIANA

VS.

HENRY BROWN, WILLIE KELLY, L. C. BIBBINS,
ROBERT SMITH and CLEVELAND McKINZIE

BILL OF EXCEPTION NUMBER 2

BE IT REMEMBERED that before entering on the trial of this case your defendants, having heard the bill of information read and protesting that they were not guilty of the offense set out therein filed the following Motion to Quash:

Now Into Court, through undersigned counsel comes, Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith and Cleveland McKinzie reserving their rights to file other necessary pleadings herein, having been informed that they have been charged in a Bill of Information in the above and entitled cause, for the crime of "Disturbing the peace," and protesting that they are not guilty of the offense set out in the Bill of Information in its entirety, for the reason that Movers have been and will be deprived of the due process of law as guaranteed by Article I, section 2, 10 and 11 of the Constitution of Louisiana and the Fourteenth Amendment of the Constitution of the United States as follows:

1. That the Bill of Information on which defendants have been charged does not inform the defendants of which, if any, crimes they have committed under the laws of the State of Louisiana.

2. That in the alternative, if this Court finds that the defendants have been properly informed of the acts they are accused of committing, then only in the alternative the defendants aver that LSA R.S. 14:103.1 is unconstitutional on its face, in that it is vague in not setting forth specific criminal conduct with the requisite intent required by the law of the State of Louisiana, and more specifically, your movers are being deprived of their rights under Article 1, sections 2, 10 and 11 of the Constitution of the State of Louisiana, as well as those under the Fourteenth Amendment to the United States Constitution, because this law is unconstitutional.

3. That the statute on which the prosecution is based and the Bill of Information founded thereon, fail to charge a punishable offense for want of allegation of active criminal intent and/or specific intent.

[fol. 17] 4. That the Bill of Information and the prosecution ensued thereon, are unconstitutional, because they violate the First and Fourteenth Amendments of the Constitution of the United States by depriving defendants of freedom of Assembly and equal protection of the laws.

5. That the Bill of Information and the Statute cited thereon are defective and struck with constitutional disabilities because they purport to unlawfully delegate powers inherently legislative to officers of the executive and/or to the owners of premises or to the public at large; such unlawful delegation of unlimited discretion over the public and your movers being without ascertainable standards, limits, or scope, all of which deprive your movers of their rights

under the State and Federal Constitutions, the laws of the United States and of the State of Louisiana and particularly those granted them under Articles I, V and XIV of the Federal Constitution, without due process of law.

WHEREFORE, the said defendants, Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith and Cleveland McKinzie pray that this Motion to Quash be maintained, and that the said information be declared null and void, and that they be discharged therefrom.

That on March 25, 1964 a hearing was had contradictorily with the State on the said Motion to Quash.

That on March 25, 1964 the Court denied the Motion to Quash to which denial your defendants then and there objected and reserved a bill of exceptions, making a part of the Bill of Exceptions the Motion to Quash and the court's ruling thereon.

That defendants first submitting this his formal bill of exceptions to the District Attorney now tenders the same to the Court and prays that the same be signed and sealed by the Judge of this Court pursuant to the Statute in such case made and provided which is done accordingly this 7th day of October, 1964.

/s/ JOHN R. RARICK
Judge

No. B-4420

20TH JUDICIAL DISTRICT COURT

PARISH OF EAST FELICIANA

STATE OF LOUISIANA

STATE OF LOUISIANA

vs.

HENRY BROWN, WILLIE KELLY, ET AL.

PER CURIAM TO BILL OF EXCEPTIONS NUMBER 2

By motion to quash, defendants set forth numerous and sundry grounds attacking this statute. No evidence was offered on the motion and at the hearing, T-2, the defendants abandoned all but one attack, stating:

> "The question and only question before this Court, is whether or not Negroes going to a public library in the absence of loud and boisterous conduct, can be construed as a crime. This is the only issue before the Court . . . (T-12)"

Obviously defendants presupposed evidence not in the record or before the court in considering the merits of their argument. Before the Court was simply a misdemeanor information charging breach of the peace by intentionally congregating in the Audubon Library and refusing to leave when requested to do so by person in charge and later by the sheriff. No race relations case was made in the information. The legal presumption favors the constitutionality of our laws.

Howbeit for argument, an act legal under normal circumstances can be performed at places and times, intentionally, so as to justify behavior criminal in nature. A library open to the public, must have someone in charge for order and maintenance. There must be hours and rules established. To legally hold that the librarian in charge has no authority to request those who have utilized the services to move on, could be tantamount to ordering a library to remain open 24 hours a day and 7 days a week.

Clearly the information smacks of an intentional act to repudiate the authority of the librarian in charge for the purpose of breaching the peace. Nothing more—nothing less.

Thus the ruling of this Court.

John R. Rarick, Judge.

Duly sworn to by Nils R. Douglas, jurat omitted in printing.

[fol. 19]

ATTACHMENT TO APPLICATION

No. B-4420

20TH JUDICIAL DISTRICT COURT
PARISH OF EAST FELICIANA
STATE OF LOUISIANA

STATE OF LOUISIANA
vs.
HENRY BROWN, WILLIE KELLY, L. C. BIBBINS,
ROBERT SMITH and CLEVELAND MCKINZIE

BILL OF EXCEPTION NUMBER 3

BE IT REMEMBERED that on the trial of this case the State called as its witness Miriam Feingold and the following took place:

Ques. State your name for the record, and spell it please?
Ans. Miriam Feingold.

Ques. What is your residence?
Ans. Clinton, Louisiana.
Ques. How long have you been a resident of Clinton?
Ans. Since August of 1963.
Ques. What was your residence before that?
Ans. New York City.
Ques. Your address.
Ans. 64 Sterling Street, Brooklyn, New York.
Ques. Under what circumstances did you come to Clinton, Louisiana?
Ans. I came as a task-force.

By Mr. Bell. If it would please the court, I would like to interpose an objection here that it is irrelevant and immaterial and has nothing to do with this particular case what circumstances she came here under. I think that the question here is whether or not these five defendants were guilty of disturbing the peace by entering the Audubon Library, and I think that's irrelevant and immaterial to the issue in this case.

By the Court. What is your offering to prove?

By Mr. Kilbourne. If your Honor please, I am merely laying a foundation for further examination of the witness. I don't think I should be required to ask my questions in any particular order.

By the Court. The Court overrules the objection, proceed.

Defendants now perfect the above recited bill of exception making the question, the objection by the defense and the ruling of the court all a part of the formal bill of exception and first submitting this bill of exception to the District [fol. 20] Attorney now tenders the same to the court and prays that the same be signed and sealed by the Judge of this court pursuant to the statute in such case made and provided which is done accordingly this 7th day of October, 1964.

/s/ John R. Rarick
Judge

[fol. 21]

ATTACHMENT TO APPLICATION

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PARISH OF EAST FELICIANA

STATE OF LOUISIANA

STATE OF LOUISIANA

vs.

HENRY BROWN, WILLIE KELLY, L. C. BIBBINS,
ROBERT SMITH and CLEVELAND MCKINZIE

BILL OF EXCEPTION NUMBER 4

BE IT REMEMBERED that on the trial of this case the State called as its witness Miriam Feingold and the following took place:

Ques: Do you know when and by whom the visit of these five defendants to the Audubon Library was planned?

By Mr. Elie: Objection, there is no testimony to show that it was planned. Your Honor, no sufficient predicate has been laid for this question.

By the Court: Will the District Attorney lay a little more foundation?

Ques: Do you know whether or not this visit to the Audubon Library by these five defendants was planned in advance?

Ans: Would you please specify what you mean by "planned in advance."

Ques: Yes, I will try to be a little more specific on that. I will put it this way: Was that one of the projects of the Congress of Racial Equality in this community, to have these men or other Negroes go to the Audubon Library?

By Mr. Bell: Your Honor, of course, I have objected to that on the grounds that I think that is irrelevant and immaterial. I think these people are charged with disturbing the peace under 14:103.1, and it's no charge of criminal conspiracy here at all; in the presence of a plan that would indicate a conspiracy. That's what I think the District Attorney is getting at now, he is attempting to prove a conspiracy, alleged, neither has it been charged, just a blanket indictment for disturbing the peace. I think if the witness would answer a question like that, it certainly would indicate that she is testifying to a conspiracy, and that would involve a lot of other people besides these defendants.

By the Court: Do you want to be heard on it?

By Mr. Kilbourne: Yes. Your Honor, I believe I alleged [fol. 22] that they went there with the intent to provoke a disturbance of the peace, that's all I am getting at. Of course, every crime that has more than one defendant involves also the crime of conspiracy. That doesn't necessarily mean that they have to be charged, I will certainly admit that. I think the State is obliged to try to prove what the intent was to which these defendants went to the Library.

By the Court: The Court will overrule the objection.

By Mr. Bell: I would like to reserve a Bill of Exceptions, Your Honor, making the question, the objection and the argument of counsel all a part of the formal bill of exceptions.

Defendants now perfect the above recited bill of exception making the question, the objection, and the argument of counsel all a part of the formal Bill of exceptions and first submitting this his bill of exception to the District Attorney now tenders the same to the court and prays that the same be signed and sealed by the judge of this court pursuant to the statute in such case made and provided which is done accordingly this 7th day of October, 1964.

/s/ JOHN R. RARICK
Judge

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No. B-4420

20TH JUDICIAL DISTRICT COURT

PARISH OF EAST FELICIANA

STATE OF LOUISIANA

STATE OF LOUISIANA

VS.

HENRY BROWN, WILLIE KELLY, ET AL.

PER CURIAM TO BILL OF EXCEPTIONS NUMBERS 3 & 4

Defendants had objected to questioning by the State of a State's witness on the grounds of irrelevancy and immateriality. The reply by the State was that it was offering the evidence as foundation for further examination. Intent was a material ingredient of the crime charged, the objections were overruled.

Clinton, Louisiana this 7th day of October, 1964.

John R. Rarick, Judge.

Duly sworn to by Nils R. Douglas, jurat omitted in printing.

ATTACHMENT TO APPLICATION

No. B-4420

20TH JUDICIAL DISTRICT COURT
PARISH OF EAST FELICIANA
STATE OF LOUISIANA

STATE OF LOUISIANA

vs.

HENRY BROWN, WILLIE KELLY, L. C. BIBBINS, ROBERT SMITH and CLEVELAND MCKINZIE

BILL OF EXCEPTION NUMBER 5

BE IT REMEMBERED THAT on the trial of this case the State called as its witness Miriam Feingold and the following took place:

Ques: Were there other attempts to enter other branches of the Audubon Library on the same date as this attempt to enter the Audubon Branch Library?

By Mr. Bell: Your Honor, I hate to keep objecting, but the Bill of Information reads that "on the 7th day of March, 1964, these named defendants, with the intent to provoke a breach of the peace, and under circumstances such a breach of the peace might be occasioned, thereby congregated together in the Audubon Library Building in the Town of Clinton, Louisiana, and did then and there fail and refuse to leave said premises when ordered to do so by Mrs. Marshall Perkins, who then and there in lawful charge of the said premises; and then and there further failed and refused to leave when ordered to do so by Sheriff Doughty." It appears to me that that's all we have to do—I am not trying to dictate to the State how to prove their case, but we haven't gotten on any of this evidence yet. We are talking about integrating other libraries and other places, and we haven't gotten on the points of this case. I submit that anything else other than proving that the persons here occasioned a breach of the peace over here in the Town of Clinton—that's relevant and material. It might have some vague connection, and it might show a conspiracy, but no conspiracy has been charged, and that's all we are on now, conspiracy.

By Mr. Kilbourne: Your Honor, we still get back to the question of the intent with which the defendants went into the library. If they were in concert with [fol. 25] others—I haven't mentioned the word "integrate", but I see that counsel has, so we will talk about whether they specifically intended to integrate the library. If the evidence will show that that was a concerted action by these defendants, and it may very well be a conspiracy, but that's up to me whether I want to charge them with that or not. I could have already charged them; but what I am getting at is this, if the evidence will show that these defendants and others with them acted in concert to what they say, "integrate the library," then we are getting down to the question of intent, because when you start talking about integrating something, you can easily be talking about provoking a disturbance of the peace, and it is common knowledge that that's what it has done all over the United States.

By Mr. Bell: I wasn't aware that I had used the word "integrate," but if I have, I certainly wouldn't mind if the State would concede that the library is segregated, then it would cut some of the crust away from this thing and really get to the issue of the case. If we want to make that concession and concede that the Audubon Regional Library is segregated according to race, that Negroes are excluded, then we might be able to really get down and see what the situation really is.

By Mr. Kilbourne: Your Honor, I realize that we haven't started getting to the facts of the case, and it looks like we might be a long time doing it, but I am going to have to try to persist in doing it to show the intent.

By the Court: The Court will overrule the objection.

By Mr. Bell: To which ruling of the Court we respectfully except, and ask that a formal Bill be reserved, making the questions, and the answer and argument of counsel to be a part of the formal Bill.

Defendants now perfect the above recited bill of exception making the question, the answer and argument of counsel all a part of the formal bill of exceptions and first submitting this his bill of exception to the District Attorney now tenders the same to the court and prays that the same be signed and sealed by the Judge of this court pursuant to the statute in such case made and provided which is done accordingly this 7th day of October, 1964.

/s/ JOHN R. RARICK
Judge

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No. B-4420

20TH JUDICIAL DISTRICT COURT
PARISH OF EAST FELICIANA
STATE OF LOUISIANA

STATE OF LOUISIANA
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HENRY BROWN, WILLIE KELLY, ET AL.

PER CURIAM TO BILL OF EXCEPTIONS NUMBER 5

This bill was reserved on the Court's overruling defendants objection to the District Attorney's question; "there were other attempts to enter other branches of the Audubon Library on the same date . . . "

Intent being a necessary showing by the state, other instances of criminal intent to establish a design or pattern of acts is admissible. Thus the basis for the Court's ruling.

Clinton, Louisiana this 7th day of October, 1964.

John R. Rarick, Judge.

Duly sworn to by Nils R. Douglas, jurat omitted in printing.

[fol. 27]

ATTACHMENT TO APPLICATION

No. B-4420

20TH JUDICIAL DISTRICT COURT

PARISH OF EAST FELICIANA

STATE OF LOUISIANA

STATE OF LOUISIANA

vs.

HENRY BROWN, WILLIE KELLY, L. C. BIBBINS, ROBERT SMITH and CLEVELAND McKINZIE

BILL OF EXCEPTION NUMBER 6

BE IT REMEMBERED that on April 9, 1964 the date to which the trial had been continued, and during the trial of this matter the State called Mrs. Marshall Perkins the Regional Librarian of The Audubon Regional Library and the following took place upon cross examination by Mr. Collins:

Ques. In other words, it's your testimony that there were no racial restrictions, there were none at that time, and there are none now, with reference to the use of any of the facilities of the Audubon Regional Library, is that a fact?

By Mr. Kilbourne: I object to that, Your Honor.

By the Court: Sustain the objection.

By Mr. Collins: Your Honor, counsel for the defendants respectfully reserves a bill of exceptions, making the testimony of the witness and the question part of the record. I don't think that we can get to the heart of the question.

By the Court: I don't understand what you mean by "heart" of it, but we are not trying a race-case, we are try-a Disturbing the Peace case, a simple misdemeanor case. Let's not belabor it any more, let's get ahead with the case at hand.

Defendants now perfect the above recited bill of exception making the testimony of the witness and the question a part of the bill of exceptions and first submitting this his bill of exception to the District Attorney now tenders the same to the Court and prays that the same be signed and sealed by the Judge of this Court pursuant to the Statute in such case made and provided which is done accordingly this 7th day of October, 1964.

/s/ JOHN R. RARICK
Judge

[fol. 28]

ATTACHMENT TO APPLICATION

No. B-4420

20TH JUDICIAL DISTRICT COURT
PARISH OF EAST FELICIANA
STATE OF LOUISIANA

STATE OF LOUISIANA

vs.

HENRY BROWN, WILLIE KELLY, L. C. BIBBINS,
ROBERT SMITH and CLEVELAND MCKINZIE

BILL OF EXCEPTION NUMBER 7

BE IT REMEMBERED that on April 9, 1964 the date to which the trial had been continued, and during the trial of this matter the State called Mrs. Marshall Perkins the Regional

Librarian of the Audubon Regional Library and the following took place on cross examination by Mr. Collins:

Ques: Isn't it a fact, Mrs. Perkins, that the Blue Bookmobile was the one that was designated to be used by Negroes only?

By Mr. Kilbourne: I object your Honor, it's irrelevant.

By the Court: Sustain the objection.

By Mr. Collins: To which ruling of the court, counsel for the defendants respectfully reserve a Bill of exceptions making the question and the record a part thereof.

Defendants now perfect the above recited bill of exception making the testimony of the witness and the question a part of the bill of exceptions and first submitting this his bill of exception to the District Attorney now tenders the same to the court and prays that the same be signed and sealed by the Judge of this Court pursuant to the statute in such case made and provided which is done accordingly this 7th day of October, 1964.

/s/ John R. Rarick
Judge

[fol. 29]

ATTACHMENT TO APPLICATION

No. B-4420

20TH JUDICIAL DISTRICT COURT

PARISH OF EAST FELICIANA

STATE OF LOUISIANA

STATE OF LOUISIANA

vs.

HENRY BROWN, WILLIE KELLY, L. C. BIBBINS, ROBERT SMITH and CLEVELAND MCKINZIE

BILL OF EXCEPTION NUMBER 8

BE IT REMEMBERED that on April 9, 1964 the date to which the trial had been continued, and during the trial of this matter the State called Sheriff Arch V. Doughty and the following took place on cross examination:

Ques: And as Sheriff of this Parish, you would be in a position to know that it has been customary for the Parish to maintain segregation of the races?

By Mr. Kilbourne: I object, your honor.

By the Court: I sustain the objection.

By Mr. Bell: To which ruling we except and ask that a formal Bill of exceptions be reserved, making the question and the answer, and the ruling of the court all a part of the formal bill.

Defendants now perfect the above recited bill of exception making the question, and the answer and the ruling of the court all a part of the formal bill and first submitting this his bill of exception to the District Attorney now tenders the same to the court and prays that the same be signed and sealed by the Judge of this court pursuant to the statute in such case made and provided which is done accordingly this 7th day of October, 1964.

/s/ JOHN R. RARICK
Judge

[fol. 30] No. B-4420

20TH JUDICIAL DISTRICT COURT

PARISH OF EAST FELICIANA

STATE OF LOUISIANA

STATE OF LOUISIANA

VS.

HENRY BROWN, WILLIE KELLY, ET AL.

PER CURIAM TO BILL OF EXCEPTIONS NUMBERS 6, 7 & 8

Bill numbered 6, 7, & 8 were taken to the Court's adverse ruling, upon the State's objection, to the defendants' questions on cross examination such as "racial restrictions", "Negro use", and "maintenance of segregation".

The obvious intent of the defense throughout the trial was to inject into the record inflammatory and irrelevant evidence of a race nature to cloud up the issues of the case. The record is clear that this was no integration case. These men went into the library, they were served and waited on. The criminal charge rests or falls on their intentional acts in refusing to obey the orders of the librarian to leave after they had been served. The evidence sought offered nothing of a probative value on guilt or innocence. Thus the ruling.

Clinton, Louisiana this 7th day of October, 1964.

John R. Rarick, Judge.

Duly sworn to by Nils R. Douglas, jurat omitted in printing.

ATTACHMENT TO APPLICATION

No. B-4420

20TH JUDICIAL DISTRICT COURT

PARISH OF EAST FELICIANA

STATE OF LOUISIANA

STATE OF LOUISIANA

vs.

HENRY BROWN, WILLIE KELLY, L. C. BIBBINS,
ROBERT SMITH and CLEVELAND MCKINZIE

BILL OF EXCEPTION NUMBER 9

BE IT REMEMBERED that at the conclusion of the trial of this case, the defendants were found guilty as charged. On a subsequent day of court before any judgment was entered on said verdict, and before any sentence had been imposed, defendants through counsel filed the following Motion for a New Trial.

Now Into Court, through undersigned counsel comes, Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith and Cleveland McKinzie, defendants in the above entitled and numbered cause and now move the court to set aside the judgment rendered in this cause and grant a new trial, for the following reason: (Defendants herein especially reserving the right to enlarge and more particularly articulate the herein motion after receipt of transcript from the court reporter, Mrs. Erma Parden).

1. There is no evidence in the record to support the judgment, WHEREFORE, movers pray that this motion be granted and a new trial be ordered in these proceedings.

Subsequently, a hearing was had on the Motion for a New Trial after which hearing the Motion was denied and counsel for defendant timely excepted to the ruling of the court, making the Motion for a New Trial and the ruling of the Court all a part of the Bill of Exceptions. Your defendants now perfect this their bill of exception making a part of same the Motion for a New Trial, and the entire record and the ruling of the Court all a part of the Bill of Exceptions and first submitting this his bill of exceptions to the District Attorney, now tenders the same to the court and prays that the same be signed and sealed by the Judge of this Court, pursuant to the statute in such case made and provided, which is done accordingly this 7th day of October, 1964.

/s/ John R. Rarick
Judge

[fol. 32]

No. B-4420

20th Judicial District Court
Parish of East Feliciana
State of Louisiana

State of Louisiana
vs.
Henry Brown, Willie Kelly, et al.

Per Curiam to Bill of Exceptions Number 9

A motion for new trial was submitted to the Court. At the time of its submission the sole basis for the motion was limited to the allegation "no evidence in the record to support the judgment."

The motion failing to set forth any specific errors or grounds for suggestion of error, nothing was submitted to the Court for a reconsideration of the case. Thus the basis for the ruling.

Clinton, Louisiana this 7th day of October, 1964.

John R. Rarick, Judge.

Duly sworn to by Nils R. Douglas, jurat omitted in printing.

[fol. 33]

IN THE SUPREME COURT OF LOUISIANA

New Orleans, 70112

October 26, 1964

No. 47,496

STATE OF LOUISIANA

v.

HENRY BROWN et al.

In re: Henry Brown et al. applying for writs of mandamus, certiorari and prohibition.

ORDER DENYING APPLICATION FOR WRITS OF MANDAMUS, CERTIORARI AND PROHIBITION—October 26, 1964

The application is denied. We find no error in any of the rulings and judgment complained of.

JBF, JBH, FWH, EHMcC, WBH, JWS, FWS.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 34]

IN THE SUPREME COURT OF LOUISIANA

No. 47,496

STATE OF LOUISIANA

vs.

HENRY BROWN et al.

PETITION FOR STAY OF EXECUTION OF SENTENCE AND ORDER GRANTING SAME—Filed October 28, 1964

To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the State of Louisiana:

The petition of Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith and Cleveland McKinzie, defendants in the above numbered and entitled cause, with respect represents:

1. That the decree of this Honorable Court rendered October 26, 1964, refusing their Application for Writs of Mandamus, Certiorari and Prohibition and, thus affirming the verdict and sentence of the Twentieth Judicial District Court of Louisiana is final, there being no right of rehearing therefrom.

2. Petitioners aver that the opinion and decree of this Honorable Court deprives them of their rights guaranteed under the First and Fourteenth Amendments to the Constitution of the United States, depriving them of freedom of speech, liberties, privileges, immunities, due process and equal protection of the laws and also deprives them of rights granted by the Sixth Amendment of the Constitution of the United States and of rights guaranteed by Section 9 Article One of the Louisiana Constitution, which rights are guaranteed all citizens of the State of Louisiana and the United States.

[fol. 35] 3. Petitioners aver that the following errors were made in the trial of the charges against them:

(1) The court's action in denying questions 6 and 7 of the application for a bill of particulars. Among the questions asked in the Application For A Bill Of Particulars were:

6. Does the State contend that the mere presence of the defendants in the Audubon Library building violated L.S.A.-R.S. 14:103.1?

7. Does the State contend that the public is not generally invited to use the facilities and resources of the Audubon Library building in the Town of Clinton?

This is included in bill of exception number one.

(2) The court's action in denying defendants Motion to Quash. In the Motion to Quash defendants set out rights protected under the first and fourteenth amendments free speech, and assembly and denials of fourteenth amendment due process and equal protection rights. Petitioner does not waive any of the other allegations made in the Motion to Quash. This is included in bill of exception number two.

(3) The court's action in denying bills of exceptions numbered 3, 4 and 5 by which defendants objected to a fishing expedition and series of wholly irrelevant questions of one of the state's witnesses.

(4) The court's action in denying a question proffered by the defense to a witness for the state which question was:

"In other words, it's your testimony that there were no racial restrictions, there were none at that time, and there are none now, with reference to the use of any of the facilities of

> the Audubon Regional Library, is that a fact?"

This is included in bill of exception number 6.

[fol. 36] (5) The court's denial of the following question:

> "Isn't it a fact, Mrs. Perkins, that the Blue Bookmobile was the one that was designated to be used by Negroes only?"

This is included in bill of exception number 7.

(6) The court's denial of the following question:

> "And as sheriff of this parish, you would be in a position to know that it has been customary for the parish to maintain segregation of the races?"

This is included in bill of exception number 9.

Timely bills of exceptions were reserved to all the above errors.

4. Petitioners aver that they are desirous of applying to the Supreme Court of the United States for a Writ of Certiorari and Review, or appeal, to review the decision of the Honorable Court upon the issues shown by the record in this case; and that petitioners desire that they be given a stay in the execution of their sentences in which to apply to said court; and that the decree or mandate of this Honorable Court be stayed so that petitioners will have an opportunity to so present their application to the Supreme Court of the United States for relief.

Wherefore, petitioners pray that after due consideration that this Honorable Court grant them a reasonable stay of execution and that they be permitted delay of 90 days in which to prepare and file in the Supreme Court of the United States their application for a Writ of Certiorari or appeal to review the decision of this Honorable Court and that the mandate and decree of this Honorable Court be withheld accordingly and for all general and equitable relief.

Robert F. Collins, Nils R. Douglas, Lolis E. Elie,
2211 Dryades Street, New Orleans, Louisiana,
By: ....;
Murphy W. Bell, 971 South 13th Street, Baton
Rouge, Louisiana.

Of Counsel: Carl Rachlin, 280 Broadway, New York, New York; Floyd B. McKissick, 213½ W. Main Street, Durham, North Carolina.

[fol. 37] ORDER

Let petitioners be granted a stay of execution of the decree of this Honorable Court for a period of 30 days.

Jno. B. Fournet, Chief Justice.

New Orleans, Louisiana, November 4th, 1964.

CERTIFICATE

I certify that a copy of this petition has been mailed to opposing counsel.

Nils R. Douglas

The foregoing stay of execution is hereby extended for an additional thirty days, i.e., until January 4th, 1965.

Jno. B. Fournet, Chief Justice.

11/25/64

[File endorsement omitted]

[fol. 38]

IN THE SUPREME COURT OF LOUISIANA

No. 47,496

STATE OF LOUISIANA

vs.

HENRY BROWN et al.

PETITION FOR STAY OF EXECUTION OF SENTENCE AND ORDER GRANTING SAME AND, IN THE ALTERNATIVE, AN APPLICATION FOR HABEAS CORPUS, AND, IN THE ALTERNATIVE, APPLICATION FOR A WRIT OF MANDAMUS—Filed November 4, 1964

To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the State of Louisiana:

The petition of Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith and Cleveland McKinzie, defendants in the above numbered and entitled cause, with respect represents:

I. Petition for Stay of Execution of Sentence

1. That the decree of this Honorable Court rendered October 26, 1964, refusing their Application for Writs of Mandamus, Certiorari and Prohibition and, thus affirming the verdict and sentence of the Twentieth Judicial District Court of Louisiana is final, there being no right of rehearing therefrom.

2. Petitioners aver that the opinion and decree of this Honorable Court deprive them of their rights guaranteed under the First and Fourteenth Amendments to the Constitution of the United States, depriving them of freedom of speech, liberties, privileges, immunities, due process and equal protection of the laws and also deprive them of rights granted by the Sixth Amendment of the Constitution of the United

States and of rights guaranteed by Section 9 Article [fol. 39] One of the Louisiana Constitution, which rights are guaranteed all citizens of the State of Louisiana and the United States.

3. That there is presently pending before this Court in this matter a petition for Stay of Execution of Sentence which was filed on October 28, 1964, and has not yet been acted upon to petitioners' knowledge.

4. Petitioners have been informed that while formerly this Honorable Court granted Stays in the execution of sentences: that no longer is this the case where certiorari is denied and it is now the duty of the trial court to act upon said petition.

5. That following the new procedure, Application for Stay of Execution was made to and denied by John R. Rarick, Judge of the Twentieth Judicial District Court, on November 2, 1964.

6. The petition denying the Stay of Execution is attached hereto and made a part hereof.

7. That petitioners are entitled of right to a stay in the execution of their sentences to apply to the Supreme Court of the United States for a review of their cases.

8. Petitioners aver that the following errors were made in the trial of the charges against them:

   A. The court's action in denying questions 6 and 7 of the application for a bill of particulars. Among the questions asked in the application for a bill of particulars were:

      6. Does the State contend that the mere presence of the defendants in the Audubon Library building violated L.S.A.-R.S. 14:103.1?

      7. Does the State contend that the public is not generally invited to use the facilities and resources of the Audubon Library building in the Town of Clinton?

This is included in bill of exception number one.

[fol. 40] B. The court's action in denying defendants' Motion to Quash. In the Motion to Quash defendants set out rights protected under the First and Fourteenth Amendments free speech, and assembly and denials of Fourteenth Amendment due process and equal protection rights. Petitioner does not waive any of the other allegations made in the Motion to Quash. This is included in bill of exception number two.

C. The court's action in denying bills of exceptions numbered 3, 4 and 5 by which defendants objected to a fishing expedition and series of wholly irrelevant questions of one of the state's witnesses.

D. The court's action in denying a question proffered by the defense to a witness for the state which question was:

> "In other words, it's your testimony that there were no racial restrictions, there were none at that time, and there are none now, with reference to the use of any of the facilities of the Audubon Regional Library, is that a fact?"

This is included in bill of exception number 6.

E. The court's denial of the following question:

> "Isn't it a fact, Mrs. Perkins, that the Blue Bookmobile was the one that was designated to be used by Negroes only?"

This is included in bill of exception number 7.

F. The court's denial of the following question:

> "And as sheriff of this parish, you would be in a position to know that it has been customary for the parish to maintain segregation of the races?"

This is included in bill of exception number 9.

Timely bills of exceptions were reserved to all the above errors.

9. Petitioners aver that they are desirous of applying to the Supreme Court of the United States for a Writ [fol. 41] of Certiorari and Review, or appeal to review the decision of the Honorable Court upon the issues shown by the record in this case; and that petitioners desire that they be given a stay in the execution of their sentences in which to apply to said court; and that the decree or mandate of this Honorable Court be stayed so that petitioners will have an opportunity to so present their application to the Supreme Court of the United States for relief.

[fol. 42]

II. Alternative Application for Writ of Habeas Corpus

The Alternative Petition of Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith and Cleveland McKinzie appearing herein through undersigned counsel with respect represents:

1. That above defendants were charged, tried and convicted in the 20th Judicial District Court with violation of L.S.A.-R.S. 14:103.1.
2. That defendant Henry Brown was sentenced to pay a fine of $150.00 and costs and in default of fine to serve 90 days in the Parish Jail. That the other four defendants were sentenced to pay a fine of $35.00 and costs and in default of fine to serve 15 days in the Parish Jail.
3. That this is an unappealable case, being a misdemeanor.
4. That application for supervisory writs was made in this Honorable Court and denied on Monday, October 26, 1964.
5. That an application for a Stay in the Execution of the sentence was made in this Honorable Court on

Wednesday, October 28, 1964 and as yet has not been acted upon to petitioners knowledge.

6. Petitioners have been informed that while formerly This Honorable Court granted Stays in the Execution of sentences: that no longer is this the case where certiorari is denied and it is now the duty of the trial court to act upon said petition.

7. That following the new procedure petitioners applied for a Stay in the execution of their sentences to Judge John R. Rarick of the 20th Judicial District Court. This petition was denied on November 2, 1964.

8. That petitioners, Robert Smith and Cleveland McKinzie were arrested on Friday, October 30th, 1964 by the authority of a bench warrant issued by Judge John R. Rarick.

9. That petitioners Henry Brown, L. C. Bibbins, and Willie Kelly fear they will be unlawfully arrested and jailed.

[fol. 43] 10. That all five petitioners have a right to a stay in the execution of their sentences; and that Robert Smith and Cleveland McKinzie are being unlawfully detained. That this right was created once application for a stay had been made to the State Supreme Court according to the old procedure and had been reinforced once application had been made for a stay to the trial judge.

11. That the refusal of Judge John R. Rarick is an abuse of his discretion and a violation of defendants' right not to be deprived of their liberty without due process of law as guaranteed by the Fourteenth Amendment of the U. S. Constitution.

12. That the refusal of the trial judge to grant the Stay of Execution of sentence is in violation of the following laws:

1.) L.S.A.-R.S. 15:539:

"No other than a suspensive appeal is allowable in any criminal case."

2.) L.S.A.-R.S. 15:550:

"No person convicted of a felony shall be discharged on bail pending his appeal; provided, that when a sentence of less than five years at hard labor is actually imposed, bail shall be allowed pending appeal and until final judgment."

3.) L.S.A.-R.S. 15:551:

"Whenever an accused shall have taken an appeal in a misdemeanor case, the trial judge shall exact of him a bond with good and solvent sureties, in such sum as the trial judge shall fix, conditioned upon the appearance of said accused in the trial court to receive such sentence as the appellate court shall have affirmed."

13. That it is not necessary for petitioners to go through an exercise in futility by requesting Habeas Corpus of the trial judge since he has denied a Stay in the execution of their sentences.

14. That today, November 3, 1964, is election day and all courts are closed thus preventing the securing of certified copies of the bench warrants for the arrests of petitioners, and that a request has been sent to the Clerk of the 20th Judicial District Court for same.

[fol. 44]

Wherefore, petitioners pray that after due consideration that this Honorable Court grant them a reasonable stay of execution and that they be permitted a delay of 90 days in which to prepare and file in the Supreme Court of the United States their application for a writ of Certiorari or appeal to review the decision of this Honorable Court and that the mandate and decree of this Honorable Court as well as the execution of the sentence of the District Court be withheld accordingly and for all general and equitable relief.

Alternatively, petitioners pray that a Writ of Habeas Corpus issue forthwith directing the Sheriff of East Feliciana Parish, Arch V. Doughty to show cause within three days why the Writ should not be granted.

Alternatively, petitioners pray that the premises and annexed affidavit considered that a Writ of Mandamus do issue herein directed to the Honorable Judge John R. Rarick, Judge of the 20th Judicial District Court commanding him to sign the requested Stay order and immediately release all defendants arrested as a result of his bench warrant in case number B-4420, State of Louisiana v. Henry Brown, et al. or that he show cause to the contrary, if any he can or have, on such a day and at such an hour as this Honorable Court may order and that after due proceedings had that said Writ of Mandamus be made perpetual and for all general relief.

Robert F. Collins, Nils R. Douglas, Lolis E. Elie, Attorneys for Defendants, 2211 Dryades Street, New Orleans, Louisiana, By: Nils R. Douglas, Trial Attorney.

Order

Let petitioners be granted a Stay of Execution in the above matter for days from 1964.

Chief Justice

New Orleans, Louisiana
1964.

[fol. 45]

Order

Considering the petition of Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith and Cleveland McKinzie filed herein, claiming that they are illegally imprisoned and restrained of their liberty by Sheriff Arch V. Doughty in the East Feliciana Parish Jail and it appearing that a writ of habeas corpus ought to issue,

It Is Ordered that a writ of habeas corpus issue out of and under the seal of this court, directed to the said Arch V. Doughty commanding him to have the bodies of Robert Smith and Cleveland McKinzie before me in the court room of this court on the day of 1964. To do and receive what shall then and there be considered concerning the said Robert Smith and Cleveland McKinzie, together with the time and cause of their detention and that he, the said Arch V. Doughty, have then and there the said writ.

....

Chief Justice

New Orleans, Louisiana
1964.

Order

It Is Ordered that an alternative writ of Mandamus issue herein, directing the respondent Judge to comply with the demand of the relator, or show cause to the contrary on the .... of .... 1964 at .... o'clock . M. why the relief should not be granted.

....

Chief Justice

New Orleans, Louisiana
1964.

[fol. 46] *Duly sworn to by Nils R. Douglas, jurat omitted in printing.*

[File endorsement omitted]

[fol. 47]

ATTACHMENT TO APPLICATION
TWENTIETH JUDICIAL DISTRICT COURT
PARISH OF EAST FELICIANA
STATE OF LOUISIANA
No. B 4420
Filed:

STATE OF LOUISIANA
vs.
HENRY BROWN, ET AL.

PETITION FOR STAY OF EXECUTION OF SENTENCE

NOW INTO COURT, comes Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith and Cleveland McKenzie who with respect represents:

1. That above defendants were charged, tried, and convicted of violation of L.S.A. R.S. 14:103.1.
2. That this is an unappealable case, being a misdemeanor.
3. That a petition for supervisory writs to the State Supreme Court was denied on October 26, 1964.
4. That formerly the State Supreme Court granted stays of execution in cases like this but now the District Court must do so.
5. That certain errors were made during the trial to which bills of exceptions were urged. The same errors were urged in a motion for a new trial. These errors violate defendants rights under the U. S. Constitution and U. S. laws, rights to liberty of speech and

assembly guaranteed by the First and fourteenth amendments to the U. S. Constitution, rights to privileges, immunities, due process and equal protection of the laws guaranteed by the Fourteenth Amendment of the U. S. Constitution.

Wherefore, petitioners pray that they be granted a stay of execution in which to prepare and file in the Supreme Court of the United States their application for a writ of Certiorari or appeal to review the decision of this court.

Collins, Douglas & Elie
2211 Dryades St.
New Orleans, Louisiana

By: /s/ Nils R. Douglas

Order

Let petitioners be granted a stay of execution in the above matter for a period of 120 days.

....
Judge

Clinton, Louisiana
November , 1964

[Handwritten notation—November 2, 1964—Motion denied for a stay.—Applicants relief to U. S. Supreme Court remains open—J. R. Rarick, Judge—20th Judicial Court of Louisiana]

[fol. 48]

IN THE SUPREME COURT OF LOUISIANA

No. 47,496

STATE OF LOUISIANA

vs.

HENRY BROWN, ET AL.

PETITION FOR STAY OF EXECUTION OF SENTENCE AND ORDER GRANTING SAME—Filed November 24, 1964

To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the State of Louisiana:

The petition of Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith and Cleveland McKinzie, defendants in the above numbered and entitled cause, with respect represents:

1. That the decree of this Honorable Court rendered October 26, 1964, refusing their Application for Writs of Mandamus, Certiorari and Prohibition and, thus affirming the verdict and sentence of the Twentieth Judicial District Court of Louisiana is final, there being no right of rehearing therefrom.

2. Petitioners aver that the opinion and decree of this Honorable Court deprives them of their rights guaranteed under the First and Fourteenth Amendments to the Constitution of the United States, depriving them of freedom of speech, liberties, privileges, immunities, due process and equal protection of the laws and also deprives them of rights granted by the Sixth Amendment of the Constitution of the United States and of rights guaranteed by Section 9, Article One of the Louisiana Constitution, which rights are guaranteed all citizens of the State of Louisiana and the United States.

[fol. 49] 3. Petitioners aver that the following errors were made in the trial of the charges against them:

(1) The court's action in denying questions 6 and 7 of the application for a bill of particulars. Among the questions asked in the application for a bill of particulars were:

6. Does the State contend that the mere presence of the defendants in the Audubon Library building violate L.S.A.-R.S. 14:103.1?

7. Does the State contend that the public is not generally invited to use the facilities and resources of the Audubon Library building in the Town of Clinton?

This is included in bill of exception number one.

(2) The court's action in denying defendants Motion to Quash. In the Motion to Quash defendants set out rights protected under the First and Fourteenth Amendments free speech, and assembly and denials of Fourteenth Amendment due process and equal protection rights. Petitioner does not waive any of the other allegations made in the Motion to Quash. This is included in bill of exception number two.

(3) The court's action in denying bills of exceptions numbered 3, 4 and 5 by which defendants objected to a fishing expedition and series of wholly irrevelant questions of one of the state's witnesses.

(4) The court's action in denying a question proffered by the defense to a witness for the state which question was:

> "In other words, it's your testimony that there were no racial restrictions, there were none at that time, and there are none now, with reference to the use of any of the facilities of the Audubon Regional Library, is that a fact?"

This is included in bill of exception number 6.

[fol. 50] (5) The court's denial of the following question:

> "Isn't it a fact, Mrs. Perkins, that the Blue Bookmobile was the one that was designated to be used by Negroes only?"

This is included in bill of exception number 7.

(6) The court's denial of the following question:

> "And as sheriff of this parish, you would be in a position to know that it has been customary for the parish to maintain segregation of the races?"

This is included in bill of exception number 9.

Timely bills of exceptions were reserved to all the above errors.

4. Petitioners aver that they are desirous of applying to the Supreme Court of the United States for a Writ of Certiorari and Review, or appeal, to review the decision of the Honorable Court upon the issues shown by the record in this case; and that petitioners desire that they be given a stay in the execution of their sentences in which to apply to said court; and that the decree or mandate of this Honorable Court be stayed so that petitioners will have an opportunity to so present their application to the Supreme Court of the United States for relief.

5. Petitioners further aver that they received a stay in the execution of their sentence of thirty days. This stay was signed on November 4, 1964. This stay will expire on December 4, 1964 and they need an additional thirty days within which to complete their application to the United States Supreme Court.

Wherefore, petitioners pray that after due consideration that this Honorable Court grant them a reasonable stay of execution and that they be permitted an additional delay of thirty days in which to prepare and file in the Supreme Court of the United States their application for a Writ of Certiorari or appeal to review the decision of this Honorable Court and that the mandate and decree of this

Honorable Court be withheld accordingly and for all general and equitable relief.

[fol. 51] Robert F. Collins, Nils R. Douglas, Lolis E. Elie, 2211 Dryades Street, New Orleans, Louisiana, By: ....; Murphy W. Bell, 971 South 13th Street, Baton Rouge, Louisiana.

Of Counsel: Carl Rachlin, 280 Broadway, New York, New York.

Floyd B. McKissick, 213½ W. Main Street, Durham, North Carolina.

Order

Let petitioners be granted a stay of execution of the decree of this Honorable Court for a period of days.

....
Chief Justice

New Orleans, Louisiana, , 1964.

Certificate

I certify that a copy of this petition has been mailed to opposing counsel.

Nils R. Douglas

[fol. 52] *Duly sworn to by Nils R. Douglas, jurat omitted in printing.*

[File endorsement omitted]

[fol. 53]

IN THE SUPREME COURT OF THE STATE OF LOUISIANA

CLERK'S CERTIFICATE

I, Harold A. Moise, Jr., Deputy Clerk of the Supreme Court of Louisiana, do hereby certify that the attached pages numbered 1-55, inclusive, constitute true and correct copies of all the documents as filed in this Court in the cause entitled "State of Louisiana versus Henry Brown et al.," bearing number 47496 on the docket of this Court and number B-4420 on the docket of the 20th Judicial District Court, Parish of East Feliciana.

In Witness Whereof, I hereunto sign my name and affix the seal of the Court aforesaid, at the City of New Orleans, this the 1st day of December, A. D., 1964

HAROLD A. MOISE, JR.
Deputy Clerk, Supreme Court of Louisiana

[fol. 54]

IN THE 20TH JUDICIAL DISTRICT COURT

PARISH OF EAST FELICIANA, LOUISIANA

EXTRACT OF COURT MINUTES

Wednesday March 11th, 1964 Court opened at Nine O'clock A.M.

Present and presiding Hon. John R. Rarick, Judge.

Reading of the minutes dispensed with.

State of Louisiana Vs. B-4420 Henry Brown, L. C. Bibbins, Robert Smith, Cleveland McKinzie (Disturbing the Peace)	All defendants were formally arraigned and each pleaded not guilty and the case was ordered assigned for March 25, 1964; further ordered that Murphy W. Bell be notified of said assignment. The bond continued on each defendant.

Court adjourned until March 16th, 1964 at Nine O'clock A.M.

Monday March 23, 1964, Court opened at Nine O'clock A.M.

Present and presiding Hon. John R. Rarick, Judge

State of Louisiana
VS B-4420
Henry Brown, Willie
Kelly, L. C. Bibbins,
Robert Smith, Cleveland McKinzie
(Dist. Peace)

This case came on for trial pursuant to previous assignment. Present representing the state Hon. R. H. Kilbourne, D.A. Present representing the defendants Murphy W. Bell, attorney of Baton Rouge; Nils Douglas, attorney of New Orleans, La. Attorneys for defendants filed in open court and served on attorney for the state an application for bill of particulars, a Motion to Quash; said motions fixed for trial on March 25, 1964 at Ten O'clock A.M.

Court adjourned until March 25th, 1964 at Nine O'clock A.M.

Wednesday March 25th, 1964, Court opened at Nine O'clock A.M.

Present and presiding Hon. John R. Rarick, Judge.

Reading of the minutes dispensed with.

State of Louisiana
Vs B-4420
Henry Brown, et al.
(Dist. Peace)

This cause came on for trial pursuant to previous assignment. Present representing the State the Honorable R. H. Kilbourne, District Attorney; present representing the defendants; Elois Elie attorney of New Orleans, Louisiana, Mrs. Irma Parden was duly sworn to take the notes of testimony.

The motion for bill of particulars was taken up and the District Attorney filed an answer without answering No. 6 & 7 and the court overrules the motion to have the D.A. answer the said 6 and 7. The motion to quash was taken up and argued; the Court overruled the motion to Quash; to which ruling the counsel for defendants reserves a Bill and makes the motion and ruling of the court a part thereof. Merian Fiengold was duly sworn as a witness in this case and her testimony was not finished and the case was continued until April 6th, 1964 for further testimony.

Court adjourned until March 31, 1964 at Nine O'clock A.M.

Monday April 6, 1964 court opened at Ten O'clock A.M.

Present and presiding Hon. John R. Rarick, Judge.

Reading of the minutes dispensed with.

State of Louisiana
VS B-4420
Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith and Cleveland McKinzie
(Dist. Peace)

This cause came on for trial this day pursuant to previous assignment. Present representing the State Hon. R. H. Kilbourne, D.A.; Present representing the Defendants Murphy Bell, attorney of Baton Rouge, and Elois Eli attorney of New Orleans. Due to the absence of the Court reporter for some unknown reason the case by agreement of counsel continued the case until April 9th, 1964; all witnesses notify by the Sheriff to be back without further notice.

Court adjourned until April 8th, 1964 at Nine O'Clock A.M.

Thursday April 9, 1964 Court opened at Ten O'clock A.M.

Present and presiding Hon. John R. Rarick, Judge.

Reading of the minutes dispensed with.

State of Louisiana
Henry Brown, Willie
Vs B-4420
Kelly, L. C. Bibbins,
Robert Smith and
Cleveland McKinzie
(Dist. the Peace)

This cause came on for trial pursuant to previous assignment being continued from March 25th, 1964 for further testimony. Present representing the State Hon. R. H. Kilbourne. Present representing the defendants: Robert Collins attorney from New Orleans, La. Murphy W. Bell attorney of Baton Rouge, La. Mrs. Irma Parden was duly sworn to take the notes of testimony. After hearing testimony of the witnesses, attorneys for defendants ask for a directed verdict. After argument of counsel the court overrules the motion for a directed verdict. After hearing all of the evidence the court found the five defendants guilty as charged. Through counsel the defendants ask for the delay of sentence until May 26, 1964 at Ten o'clock A.M.; Further ordered that their bonds be continued.

Exhibits offered:

Ex. #1	A post card from Aud. Library
Ex. #2	An envelope in which a book was mailed to Henry Brown; Also the book entitled: Story of the Negro by Arna Bontempts, Ex. #3

The court granted permission to return the book to Audubon Library, East Feliciana Parish, La.

State offered one Exhibit newspaper clipping marked State #1.

Court adjourned until April 13, 1964 at Nine O'clock A.M.

Monday May 25th, 1964 court opened at nine o'clock A.M.

Present and presiding Hon. John R. Rarick, Judge.

Reading of previous minutes dispensed with.

State of Louisiana
Vs. B-4420
Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith, Cleveland McKinzie

On request of Mrs. Erma Parden, Court reporter, the Court granted an extension of time for filing transcript until June 26, 1964.

Court adjourned until Tuesday, May 26, 1964, at nine o'clock A.M.

Monday May 26th, 1964 court opened at Ten o'clock A.M.

Present and presiding Hon. John R. Rarick, Judge.

Minutes read and approved.

State of Louisiana
Vs B-4420
Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith, Cleveland McKinzie
(Dist. Peace)

The defendants and their counsel being present in Court for sentence this day. And due to the extension granted the court reporter for filing of her notes of testimony the court ordered sentence deferred until July 14, 1964 at Ten O'clock A.M.

Court Adjourned until May 27, 1964 at Nine O'clock A.M.

[fol. 56]

Tuesday, July 14, 1964 court opened at Nine o'clock A.M.

Present and presiding Hon. John R. Rarick, Judge.

Reading of the minutes dispensed with.

State of Louisiana
VS B-4420
Henry Brown, Willie
Kelly, L. C. Bibbins,
Robert Smith and
Cleveland McKinzie

A motion for a new trial was filed argued and the court refused and overruled motion for a new trial; to which ruling counsel for defendants excepts and reserves a formal bill; and asked that the ruling of the court be attached thereto and made a part thereof.

The defendants being present in court and the Court ordered that Willie Kelly, L. C. Bibbins, Robert Smith and Cleveland McKinzie be sentenced to pay a fine of $35.00 and cost; in default of payment of fine and cost to serve 15 days in the parish jail. The defendant Henry Brown being absent and counsel for defendant waived his being present for sentence the court ordered that he be sentenced to pay a fine of $150.00 and cost; in default of payment of fine and cost to serve 90 days in the Parish jail. Counsel for defendant asked that execution of the sentence be stayed; the court ordered stay of execution of the sentence for a period of 21 days; bond continued.

Court adjourned until July 15th, 1964 at Nine O'clock A.M.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 57]

Tuesday, July 28th, 1964 court opened at nine o'clock A.M.

Present and presiding Hon. John R. Rarick, Judge.

Reading of the minutes dispensed with.

State of Louisiana
Vs B-4420
Henry Brown,
Willie Kelly,
L. C. Bibbins,
Robert Smith and
Cleveland McKinzie
(Dist. Peace)

In this cause Nils Douglass, attorney for the defendants, appeared representing the defendants. Hon. R. H. Kilbourne, present in court representing the State. The following instruments were duly filed by counsel for defendants;

First: Notice of Application for supervisory Writs;

Please be advised that defendants in above styled and numbered cause will make application to the Louisiana Supreme Court for Writs of Certiorari, Mandamus and Prohibition to invoke the Supervisory Jurisdiction of said Supreme Court in order to review the sentence and conviction in the above styled and numbered cause.

Filed and Rec. 7-30-64
Inez M. Durham, Clerk

Robert F. Collins
Nils R. Douglas
Lolis E. Elie
2211 Dryades Street,
New Orleans, La.

2nd: Bill of Exception Number One—

Wherefore, the applicants pray that the State of Louisiana through the District Attorney, Parish of East Feliciana be ordered to show cause on a day and at a time certain why the said Bill of Particulars, as requested above, should not be furnished and served upon your applicants, defendants herein, and all other relief as they may be entitled.

Robert F. Collins,
Nils R. Douglas
Lolis E. Elie

3rd: Bill of Exception Number 2: Wherefore, the said defendants, Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith and Cleveland McKinzie pray that this motion to Quash be maintained, and that the said information be declared null and void, and that they be discharged therefrom.

4th: Bill of Exception Number 3: Defendants now perfect the above recited bill of exception making the question the objection by the defense and the ruling of the court all a part of the formal bill of exception and first submitting this bill of exception to the District Attorney now tenders the same to the Court and prays that the same be signed and sealed by the Judge of this Court pursuant to the statute in such case made and provided which is done accordingly this day.

5th: Bill of Exception Number 4: Defendants now perfect the above recited bill of exception making the question the objection, and the argument of counsel all a part of the formal bill of exceptions and first submitting this his bill of exception to the District Attorney now tenders the same to the Court and prays that the same be signed and sealed by the Judge of this Court pursuant to the Statute in such case made and provided which is done accordingly this day.

6th: Bill of Exception Number 5: Defendants now perfect the above recited bill of exception making the question, the answer and argument of counsel all a part of the question, the answer and argument of counsel all a part of the formal bill of exceptions and first submitting this bill of exception to the District Attorney now tenders the same to the court and prays that the same be signed and sealed by the Judge of this court pursuant to the Statute in such case made and provided which is done accordingly this day.

7th: Bill of Exception Number 6: Defendants now perfect the above recited bill of exception making the testimony of the witness and the question a part of the bill of exceptions and first [fol. 58] submitting this bill of exception to the District Attorney now tenders the same to the Court and prays that the same be signed and sealed by the Judge of this Court pursuant to the Statute in such case made and provided which is done accordingly this day.

8th: Bill of Exception Number 7: Defendants now perfect the above recited bill of exception making the testimony of the witness and the question a part of the bill of exceptions and first submitting this bill of exception to the District Attorney now tenders the same to the court and prays that the same be signed and sealed by the Judge of this Court pursuant to the statute in such case made and provided which is done accordingly.

9th: Bill of Exception Number 8: Defendants now perfect the above recited bill of exception making the question, and the answer and the ruling of the court all a part of the formal bill and first submitting this his bill of exception to the District Attorney now tenders the same to the court and prays that the same be signed and sealed by the Judge of this Court pursuant to the statute in such case made and provided which is done accordingly this day.

10th: Bill of Exception Number 10: There is no evidence in the record to support the judgment, Wherefore, mover prays that this motion be granted and a new trial be ordered in these proceedings; subsequently, a hearing was had on the motion for a new trial after which hearing the motion was denied and counsel for defendant timely excepted to the ruling of the Court, making the Motion for a new trial and the ruling of the Court all a part of the bill of exception. Your defendants now perfect this their bill of exception making a part of same the motion for a new trial, and the entire record and the ruling of the Court all a part of the bill of exceptions and first submitting this his bill of exceptions to the District Attorney, now tenders the same to the Court and prays that the same be signed and sealed by the Judge of this Court, pursuant to the statute in such case made and provided, which is done accordingly this day.

Court adjourned until July 29th, 1964 at Nine O'clock A.M.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 59]

IN THE 20TH JUDICIAL DISTRICT COURT
PARISH OF EAST FELICIANA, LOUISIANA
Number B-4420

STATE OF LOUISIANA,
vs.
HENRY BROWN, WILLIE KELLY, L. C. BIBBINS,
ROBERT SMITH, & CLEVELAND MCKINZIE.

Transcript of Testimony—March 25, 1964 and April 9, 1964

The transcript of the testimony of the above styled case taken in open court at the court house of East Feliciana Parish, Clinton, Louisiana, beginning at 2:00 o'clock P. M., March 25, 1964; and at 10:00 A. M., April 9, 1964. Hon. John R. Rarick, Judge, presiding.

APPEARANCES:

For plaintiff

Richard Kilbourne, Esq., District Attorney, 20th Judicial District, Clinton, Louisiana.

Defendants

Murphy W. Bell, Esq., 971 South 13th Street, Baton Rouge, Louisiana.

Defendants, on March 25, 1964

Lolis E. Elie, Esq., 2211 Dryades Street, New Orleans, Louisiana.

Defendants on April 9, 1964

Robert F. Collins, Esq., 2211 Dryades Street, New Orleans, Louisiana.

[fol. 61]

Discussion by Counsel on Application for Bill of Particulars and on the Motion to Quash and Rulings Thereon

Court Called to Order at 2:00 P.M., March 25, 1964.

By Mr. Bell: Taking up the preliminary motions in this State of Louisiana vs. Henry Brown, etc., #B-4420, if it please the Court, we would like to take up the Application for a Bill of Particulars first. Mr. Kilbourne has filed an Answer to this Application in which he answers the first 5 particulars. He failed to answer #6 and #7, and that is the bone of contention on which we are proceeding today, Your Honor, whether or not the District Attorney should be compelled to answer particularly #6 and #7 in order that these defendants may be able to properly plea to the Bill of Information filed herein. The article #6 reads, "Does the State contend that the mere presence of the defendants in the Audubon Library Building violate the R. S. 14, 103.1?" As Your Honor knows, this particular Statute was enacted by the State Legislature in 1960 pursuant to the demonstrations that have been going on in this Court, and our Legislature enacted this in order to be better able to deal with this type of conduct on the part of individuals who [fol. 62] were protesting violation of their civil rights. However, this article is a rather lengthy article and as we have alleged in the Motion to Quash, rather vague; and we are asking under these 2 articles #6 and #7, what type of conduct—we want to know what did these persons do that made them liable to a Bill or charge being filed against them by the State of Louisiana that claimed disturbance of the peace. We are asking: "Is the mere presence of these defendants in the building the cause of the violation?"

Then we are asking in #7 in order to determine what type of disturbance this is: "Does the State contend that the public is not generally invited to use the facilities and the books of the Audubon Library Building in the Town of Clinton?" I would like to know this so we will know what

[fol. 59]

IN THE 20TH JUDICIAL DISTRICT COURT
PARISH OF EAST FELICIANA, LOUISIANA
Number B-4420

STATE OF LOUISIANA,

vs.

HENRY BROWN, WILLIE KELLY, L. C. BIBBINS,
ROBERT SMITH, & CLEVELAND MCKINZIE.

Transcript of Testimony—March 25, 1964 and April 9, 1964

The transcript of the testimony of the above styled case taken in open court at the court house of East Feliciana Parish, Clinton, Louisiana, beginning at 2:00 o'clock P. M., March 25, 1964; and at 10:00 A. M., April 9, 1964. Hon. John R. Rarick, Judge, presiding.

APPEARANCES:

For plaintiff

Richard Kilbourne, Esq., District Attorney, 20th Judicial District, Clinton, Louisiana.

Defendants

Murphy W. Bell, Esq., 971 South 13th Street, Baton Rouge, Louisiana.

Defendants, on March 25, 1964

Lolis E. Elie, Esq., 2211 Dryades Street, New Orleans, Louisiana.

Defendants on April 9, 1964

Robert F. Collins, Esq., 2211 Dryades Street, New Orleans, Louisiana.

[fol. 61]

DISCUSSION BY COUNSEL ON APPLICATION FOR BILL OF PARTICULARS AND ON THE MOTION TO QUASH AND RULINGS THEREON

Court Called to Order at 2:00 P.M., March 25, 1964.

By Mr. Bell: Taking up the preliminary motions in this State of Louisiana vs. Henry Brown, etc., #B-4420, if it please the Court, we would like to take up the Application for a Bill of Particulars first. Mr. Kilbourne has filed an Answer to this Application in which he answers the first 5 particulars. He failed to answer #6 and #7, and that is the bone of contention on which we are proceeding today, Your Honor, whether or not the District Attorney should be compelled to answer particularly #6 and #7 in order that these defendants may be able to properly plea to the Bill of Information filed herein. The article #6 reads, "Does the State contend that the mere presence of the defendants in the Audubon Library Building violate the R. S. 14, 103.1?" As Your Honor knows, this particular Statute was enacted by the State Legislature in 1960 pursuant to the demonstrations that have been going on in this Court, and our Legislature enacted this in order to be better able to deal with this type of conduct on the part of individuals who [fol. 62] were protesting violation of their civil rights. However, this article is a rather lengthy article and as we have alleged in the Motion to Quash, rather vague; and we are asking under these 2 articles #6 and #7, what type of conduct—we want to know what did these persons do that made them liable to a Bill or charge being filed against them by the State of Louisiana that claimed disturbance of the peace. We are asking: "Is the mere presence of these defendants in the building the cause of the violation?"

Then we are asking in #7 in order to determine what type of disturbance this is: "Does the State contend that the public is not generally invited to use the facilities and the books of the Audubon Library Building in the Town of Clinton?" I would like to know this so we will know what type of criminal conduct these persons performed when they allegedly entered the Audubon Library Building in the Town of Clinton on that particular day. In order to determine how to apply 14, 103.1, we would like for the State to exhibit a position on whether or not the public is generally invited to use this building; or whether or not, being the [fol. 63] State has contended that the very fact that these 4 or 5 defendants, when they entered the building, their mere entering and presence violated the provision of this Statute. However, there are other provisions of this Statute which we are attacking in the Motion to Quash, but in order to be better able to plead and to argue whatever other pleadings we have to file, we think that the State in all earnestness and fairness, in order that these defendants may be able to ascertain what type of standards that the State has applied in order to make certain conduct criminal, we think that article #6 and #7 of that particular Bill of Particulars should be answered, in order that these people may be informed of what type of conduct the State has considered criminal on behalf of the public in a situation such as this.

By Mr. Kilbourne: Your Honor, I don't see how the Bill of Information could be any more explicit than it is. It says that the defendants did this: "The intent to provoke a breach of the peace, and under circumstances such as the breaching of the peace might be occasioned thereby, they [fol. 64] congregated together in the Audubon Library Building in the Town of Clinton, and they refused to leave when ordered to do so by Mrs. Perkins, who is in charge, and also refused to leave when ordered to do so by the Sheriff." That's what they are charged with. In paragraph #5 and #6 where the State contends that the mere presence of the defendants violated the Statute, that's irrelevant, Judge. We contend what we stated in the Bill of Information, that's what we contend they did, and that's what we contend was a violation of the Statute. "Does the State contend that the public is not generally invited to use the facilities?" What does that have to do with it? We don't make any contention at all about that, we just contend what we stated in the Information.

By Mr. Bell: Your Honor, I imagine we can argue it further, but we will submit the application. Your Honor, co-counsel has suggested that maybe instead of your ruling on this application for a Bill of Particulars, you rule on the Motion to Quash and maybe that would dispose of the entire matter because they are pretty close akin, if Mr. Kilbourne wouldn't object to that.

[fol. 65] By Mr. Elie: If Your Honor please, the Bill of Information in this matter is very closely akin to a similar bill that was filed in the matter, State of Louisiana vs Jerome Smith, et al. That case is to be found in 146 So. 2nd, page 152. I was one of the attorneys in this matter, and we made the same argument, some members of the Congress of Racial Equality were picketing in New Orleans. The police officers told them that they could not picket in the place that they wanted to picket, and of course they were arrested and charged under 14, 103.1. The trial judge found them guilty as charged. We appealed this matter to the State Supreme Court, and the case was reversed. The Supreme Court stated in effect through Judge Fournet that it wasn't sufficient to retract the language of the Statute; but that a defendent had a right to know specifically what he was charged with. Now, to say that a person performs an act and that a breach of the peace may be occasioned thereby, this is no standard whatever. Any police officer can make a contention right at this minute that my argument here is such that a breach of the peace may be occa- [fol. 66] sioned and thereby arrest me. This is anti-justice. State of Louisiana vs Smith was the latest pronouncement of the State Supreme Court, but taking it a step further, we find one case in particular involved—I would like to give the Court this citation, the Town of Ponchatoula vs Bates, that's at 173 La. 823, 138 So. 851. The Supreme Court of Louisiana in that instance says: "The mere fact that persons participated in conduct that tends to disturb a community, intellectual unrest so to speak, if the conduct is such that the people of the community don't agree with what they are doing, this is not sufficient to sustain a charge of disturbing the peace." More closely allied with this case is State vs Sanford, which is in 14 So. 2nd, 778. In this case some 30 Jehova's witnesses went into the Town of Shreveport and they were very unpopular, they weren't wanted there; and they went in and gave out literature and they were picked up and they were first told to stop distributing this literature. They refused to do so, and again, they were arrested, prosecuted. Our own State Supreme Court held that this did not make peaceful conduct criminal simply because you [fol. 67] don't agree with them. Going a step further, we have several cases that are nearly on all fours with this case, another Shreveport case. This case is in 82 Supreme Court, 1188. In that case a group of Negroes who were members of the Congress of Racial Equality went into the bus depot, and they went into the section that was traditionally the white section—this was subsequent to the ICC ruling—and they were arrested for going and sitting in the white side of that bus depot, and they were told by the police officers to leave. They said they had a right to be there, and indeed they did have a right. "If you don't leave we are going to arrest you," so they arrested them. They were convicted in the lower court, and the State Supreme Court denied writs without any reasons, and the U. S. Supreme Court on a procurium without hearing any arguments said that the mere fact that you didn't want these people in this facility, this isn't a crime. I suggest to Your Honor that the only way that this 14, 103.1 can be constitutional, if it applies to loud and boisterous conduct. I submit to the Court that you can make anything a crime. I can [fol. 68] walk out of this courtroom, and any police officer can decide that my walking out of this courtroom tends to cause a breach of the peace, and arrest me. There is no standard in this Statute, whatsoever, so this is why we say in the language of this Statute it's insufficient to inform the defendants of the nature of the charge against them, number one. Number two, that this is very obviously an unconstitutional application of this Statute, and it has been decided by our own State Supreme Court and by the U. S. Supreme Court on each occasion that these type of matters have been before the Court.

By Mr. Kilbourne: If Your Honor please, I am not familiar with the decisions that counsel has cited, and of course, I didn't know before the argument came up what authority he was relying on; but the State contends in any instance a person can do a lawful thing in such a way as to disturb the public. Counsel could indeed walk out of here in such a way as to disturb the public, for instance if he were carrying a loaded gun, or something of that kind. True, there is no law against a man carrying a gun, he has a right to do that, but he can do that in such a manner that [fol. 69] it would disturb the public. It's a very simple thing, and the State only contends that they went in to the Library for the specific purpose of creating a breach of the peace. It's entirely different from them going in there for some lawful purpose, for instance, to get a book or something of that nature. If the State can prove as it is alleged in the Information that they went in there for the specific purpose of creating a disturbance in the Library, and in such a manner that it created a disturbance; and if it was foreseeable, and they foresaw that, if the State can prove that, as alleged in the Information, they are certainly guilty of violating the Statute. It is further alleged that they refused to leave when they were ordered to do so. You could come right in here in this courtroom and create a disturbance in the same manner. You get 5 or 6 people to walk in here and more or less take over your courtroom, and they are ordered out and they refuse to leave, regardless of the fact that they might be guilty of contempt of court, they would also be guilty of disturbing the peace, under this Statute, [fol. 70] and that's what the State is contending.

By Mr. Elie: If Your Honor please, I am certainly willing to admit that it is possible for someone to perform an act that would disturb the peace, there is no question about this. The question, and the only question before this Court, is whether or not Negroes going to a public library, in the absence of loud and boisterous conduct, can be construed as a crime. This is the only issue before the Court, not whether I walk out of here with a loaded gun, but if I walk out of here just as I am with my briefcase, that is the issue before the Court. There isn't anything here to suggest any loud or boisterous conduct, there is nothing to suggest that it was their intent to disturb the peace, that just isn't before the Court, Your Honor.

By the Court: I believe that's what is in the Indictment, to disturb the peace, that would be an intent to provoke a breach of the peace.

By Mr. Elie: I submit the matter.

By the Court: We all agree, of course, that people can do a lot of things that are normally lawful, and if they [fol. 71] intend to do a lawful act in a manner to cause it to be unlawful, for example, to walk in the Library with our clothes off, it would be a lawful act as far as we were able to go in there, but we would certainly be disturbing the peace. It wouldn't be any act, I mean as far as any violence or any noise, to walk in there and start tearing the pages out of the books, and say you have a lawful act and freedom of expression to tear out the pages that you didn't like because of what was said in the book. I guess there is a point of no return; however, I don't think your argument applies in this one, inasmuch as the Act goes further with the suggestion that they did have a right to be there, and it says that they went over with the intent to cause a breach of the peace.

By Mr. Elie: We submit the matter on the Application for a Bill of Particulars and on the Motion to Quash.

By the Court: The Court notes that in response to the Application for a Bill of Particulars filed by the defendants, the State has filed a Bill and Answer to all paragraphs except #6 and #7. Not having made any cursory examination [fol. 72] of the cases that were cited, and inasmuch as the Indictment certainly tracks the language of the Statute itself, the Court feels that the information filed herein along with the Bill of Particulars certainly adequately apprises the defendants, and therefore the Court finds no merit in ordering the State to answer questions #6 and #7, and will deny the same.

By Mr. Bell: To which ruling of the Court we respectfully except, and ask that a formal Bill of Exceptions be reserved, making a part of the Bill, the Application for the Bill of Particulars, the Answer of the District Attorney, and the ruling of the Court all a part of the formal bill.

By the Court: The Motion to Quash again relates back to the sufficiency of the phraseology of the Bill itself, and further the Plea of Unconstitutionality. We must remember the argument we had didn't cover the rights under the State and Federal Constitution, and the Laws of the United States. The Court feels that justice can best be served in this case by hearing the facts, and the Court will deny the Motion to Quash.

[fol. 73] By Mr. Elie: To which ruling counsel respectfully reserves a Bill of Exceptions, making the Motion, the ruling of the Court a part thereof.

By the Court: You may proceed.

By Mr. Kilbourne: The State calls Miriam Feingold.

[fol. 74] The witness, Miriam Feingold, after first having been duly sworn to tell the truth, the whole truth, and nothing but the truth, so help her God, testified as follows:

Direct Examination.

By Mr. Kilbourne:

Q. State your name for the record, and spell it, please?
A. Miriam Feingold.
Q. What is your residence?
A. Clinton, Louisiana.
Q. How long have you been a resident of Clinton?
A. Since August of 1963.

Q. What was your residence before that?

A. New York City.

Q. Your address?

A. 64 Sterling Street, Brooklyn, New York.

Q. Under what circumstances did you come to Clinton, Louisiana?

A. I came as a task-force—

By Mr. Bell: If it would please the Court, I would like to interpose an objection here that it is irrelevant and immaterial and has nothing to do with this particular case what circumstances she came here under. I think the question here is whether or not these 5 defendants were guilty of disturbing the peace by entering the Audubon Library, and I think that's irrelevant and immaterial to the issue in this case.

[fol. 75] By the Court: What is your offering to prove?

By Mr. Kilbourne: If Your Honor please, I am merely laying the foundation for further examination of the witness. I don't think I should be required to ask my questions in any particular order.

By the Court: The Court overrules the objection, proceed.

By Mr. Bell: We would like to reserve a Bill of Exceptions, making the question, the objection, and the ruling of the Court all a part of a formal Bill.

Q. Will you answer the question?

A. I came as a task-force worker for the Congress of Racial Equality.

Q. Where do you live in Clinton, what is your address in Clinton?

A. At the home of Mrs. Josephine Holmes.

Q. What is your race?

A. I am Caucasian.

Q. You are the only Caucasian residing at that residence at this time?

A. Yes, I am.

Q. The owner of the residence is a colored woman, a Negro?

A. Yes, she is.

Q. Are you a task-force worker for the Congress of Racial Equality at this time?

[fol. 76] A. Yes, I am.

Q. Under whose supervision are you, and control, if anyone?

A. We work under the supervision of Ronnie Moore.

Q. Do you know the defendants here today?

A. Yes, I do.

Q. All of them?

A. Yes.

Q. How long have you known them?

A. I couldn't say.

Q. Approximately how long?

A. Many months.

Q. Have you known all of them many months?

A. Some of them longer than others.

Q. Let's take Henry Brown, how long have you known Henry Brown?

A. I really couldn't say, I have known him a long time.

Q. Have you known him since August of 1963?

A. I really can't remember.

Q. Can you say about how long?

A. Well, I would say many months, that's about all I could say about it.

Q. Is he a member of the Congress of Racial Equality? Of the Clinton Branch?

A. I refuse to answer that question on the grounds of the First, Fifth, and Fourteenth Amendments of the Constitution of the United States.

By Mr. Kilbourne: Your Honor, will you ask this witness to answer my question?

[fol. 77] By the Court: The Constitution doesn't apply to you because you are not a defendant, and I don't believe it will incriminate you if you don't know if he is, or isn't.

By Miss Feingold: I believe I pleaded the First, Fifth and Fourteenth Amendments of the Constitution of the United States.

By the Court: Do you urge your question?

By Mr. Kilbourne: I do, Your Honor.

By Mr. Elie: Did the Court say that it was granting the witness immunity from prosecution if she answers the question?

By the Court: She is asking for immunity from identifying one of the other parties.

By Mr. Elie: She is saying, as I understood it, Your Honor, that by identifying another party here would tend to incriminate her.

By the Court: Her, but she has already said that she is a member of CORE.

By Mr. Elie: If Your Honor please, once any link in the chain of evidence—if she answers this question, she doesn't know where it will lead to, and I think she has a right to [fol. 78] refuse to answer if she feels that this will tend to incriminate her; and the Court, of course, can grant her immunity, then she has to testify.

By Mr. Kilbourne: If Your Honor please, I am not sure that I understand what the contention here is. Is she talking about her constitutional rights, or is she talking about someone else's constitutional rights?

By the Court: She feels that she might incriminate herself.

By Mr. Kilbourne: If Your Honor please, I think counsel is as well aware as I am that a witness's testimony in a criminal trial cannot be used against her.

By Mr. Elie: I am also well aware, Your Honor, that there is a Statute of the State of Louisiana that if a witness refused to testify, then except for perjury, the Court can grant the witness immunity, because although the testimony may not be used against the person, the District Attorney has his knowledge that he can use to bring the charge against the person. This is the reason for the existence of the Statute.

[fol. 79] By the Court: Which Statute are you referring to?

By Mr. Elie: We don't have the Code of Criminal Procedure with us. I know the Statute exists.

By Mr. Kilbourne: Your Honor, what I can't understand is how the question I asked her, whether Henry Brown was a member of the Congress of Racial Equality, could incriminate this witness.

By Mr. Elie: The witness is no lawyer, Judge.

By the Court: Do you re-urge your question?

By Mr. Kilbourne: Yes, Your Honor, I do.

By the Court: I will have to ask you to answer the question for the District Attorney. I can't see how it can possibly incriminate you.

By Mr. Bell: Judge, is there any way we can object to the question on the grounds that it's irrelevant and immaterial? Whether this man is a member of CORE really has nothing to do with the crime with which he is charged by the State. That's beside the issue and we are really [fol. 80] getting tied up on a question that is immaterial and irrelevant, that's what I think the main objection to the question is. However, as co-counsel has said, if the Court will grant the witness immunity from anything that she might say would be used against her, I feel all objection would be removed to the question. I don't see why the witness should be compelled to answer a question when she certainly would not be given the protection of the Court, that at least her answer might not be used against her. I know for a fact that she has already answered questions under the interrogation of the District Attorney, that may well be used against her, but I feel that the Court should grant the immunity to protect her from any further incrimination by the question, especially when we feel that the question is irrelevant and immaterial to the issue at hand.

By the Court: It staggers my imagination to see how anything that she has answered today could incriminate her. I am going to ask you to answer the question of Mr. Kilbourne.

By Mr. Elie: Your Honor, is the Court presently ordering the witness to answer the question?

[fol. 81] By the Court: Yes.

By Mr. Elie: We would then like to respectfully reserve a Bill to the Court ordering the witness to answer the question without first granting the witness immunity. With the Court's permission we would like to instruct the witness to answer the question.

By the Court: Let the minutes so show.

A. Would you repeat the question, please?

The Reporter Read the Question.

A. Yes, he is.

Q. Do you know whether or not Willie Kelley is a member of the Congress of Racial Equality?

A. No, I don't know.

Q. Do you know whether L. C. Bibbins is a member of CORE?

A. No, I don't know.

Q. Robert Smith?

A. I don't know.

Q. Do you know Robert Smith?

A. Yes, I do.

Q. Point him out, please?

A. He is sitting right there (indicating).

By Mr. Kilbourne: Is your name Robert Smith?

[fol. 82] By Robert Smith: Yes, sir.

Q. How about Cleveland McKinzie, is he a member of the Congress of Racial Equality?

A. No, I do not.

Q. Do you know where Henry Brown resides? Do you know what Parish he resides in?

A. East Feliciana Parish.

Q. Where does Willy Kelly reside?

A. What do you mean?

Q. What Parish does he reside in?

A. West Feliciana Parish.

Q. What Parish does L. C. Bibbins reside in?

A. West Feliciana Parish.

Q. What Parish does Robert Smith reside in?

A. West Feliciana Parish.

Q. What Parish does Cleveland McKinzie reside in?

A. West Feliciana.

Q. Do you know when and by whom the visit of these 5 defendants to the Audubon Library was planned?

By Mr. Elie: Objection, there is no testimony to show that it was planned, Your Honor, no sufficient predicate has been laid for this question.

By the Court: Will the District Attorney lay a little more foundation?

Q. Do you know whether or not this visit to the Audubon Library by these 5 defendants was planned in advance?

[fol. 83] A. Would you please specify what you mean by "planned in advance?"

Q. Yes, I will try to be a little more specific on that. I will put it this way: Was that one of the projects of the Congress of Racial Equality in this community, to have these men or other Negroes go to the Audubon Library?

By Mr. Bell: Your Honor, of course I have to object to that on the grounds that I think that is irrelevant and immaterial. I think these people are charged with disturbing the peace under 14, 103.1, and it's no charge of criminal conspiracy here at all; in the presence of a plan that would indicate a conspiracy. That's what I think the District Attorney is getting at now, he is attempting to prove a conspiracy, and no conspiracy has been alleged, neither has it been charged, just a blanket indictment for disturbing the peace. I think if the witness would answer a question like that, it certainly would indicate that she is testifying to a conspiracy, and that would involve a lot of other people besides these defendants.

By the Court: Do you want to be heard on it?

By Mr. Kilbourne: Yes, Your Honor, I believe I alleged [fol. 84] that they went there with the intent to provoke a disturbance of the peace, that's all I am getting at. Of course, every crime that has more than one defendant involves also the crime of conspiracy. That doesn't necessarily mean that they have to be charged, but they could be charged, I will certainly admit that. I think the State is obliged to try to prove what the intent was to which these defendants went to the Library.

By the Court: The Court will overrule the objection.

By Mr. Bell: I would like to reserve a Bill of Exceptions, Your Honor, making the question, the objection, and argument of counsel all a part of the formal Bill of Exceptions.

Q. Will you read the question?

The Reporter Read the Question.

A. I never did hear an announcement to this business about whether or not I would be immune, and until I do, I refuse to answer that question on the grounds of the First, the Fifth, and Fourteenth Amendments to the Constitution of the United States.

By Mr. Kilbourne: Your Honor, I ask that this witness [fol. 85] be instructed to answer the question.

By the Court: Mr. Kilbourne, I can see this possibility that she—and still again, I don't know, you are calling her as your own witness, and I think she might be immune.

By Mr. Kilbourne: Well, the only thing about it, Your Honor, she is talking about granting her immunity, and I am sure Your Honor, and counsel will agree that except in very exceptional cases no one has the right to grant the witness immunity.

By the Court: I think under some of our prevailing cases today the easiest way to get immunity to to get into Court and testify, and then you have got immunity.

By Mr. Elie: Of course, Your Honor, I think in this instance the Court has suggested that the witness has immunity, and the District Attorney in a roundabout way, I suppose, has suggested the same thing, and we say the Court can resolve this pretty easily. The Court admits that here is an instance where the witness by answering this question may tend to incriminate herself. There are cases in which the Court has granted immunity—as a matter of [fol. 86] fact, in many instances that's the only way the Court can get information about the underworld, that's possibly the best example of granting immunity, before a Congressional Committee.

By the Court: Do you have any argument before I rule?

By Mr. Kilbourne: I have no further argument.

By the Court: In this case the Court will sustain the refusal to testify on the grounds that it might incriminate her.

Q. Were there other attempts to enter other branches of the Audubon Library on the same date as this attempt to enter the Audubon Branch Library?

By Mr. Bell: Your Honor, I hate to keep objecting, but the Bill of Information reads that: "on the 7th day of March, 1964, these named defendants, with the intent to provoke a breach of the peace, and under circumstances such a breach of the peace might be occasioned, thereby congregated together in the Audubon Library Building in the Town of Clinton, Louisiana, and did then and there fail and refuse to leave said premises when ordered to do so by Mrs. Marshall Perkins, who then and there in lawful [fol. 87] charge of the said premises; and then and there further failed and refused to leave when ordered to do so by Sheriff Doughty." It appears to me that that's all we have to do—I am not trying to dictate to the State how to prove their case, but we haven't gotten on any of this evidence yet. We are talking about integrating other libraries and other places, and we haven't gotten on the points of this case. I submit that anything else other than proving that the persons here occasioned a breach of the peace over here in the Town of Clinton—that's relevant and material, anything else is irrelevant and immaterial. It might have some vague connection, and it might show a conspiracy, but no conspiracy has been charged, and that's all we are on now, conspiracy.

By Mr. Kilbourne: Your Honor, we still get back to the question of the intent with which the defendants went into the library. If they were in concert with others—I haven't mentioned the word "integrate", but I see that counsel has, so we will talk about whether they specifically intended to integrate the library. If the evidence will show that that [fol. 88] was a concerted action by these defendants, and it may very well be a conspiracy, but that's up to me whether I want to charge them with that or not, I could have already charged them; but what I am getting at is this, if the evidence will show that these defendants and others with them acted in concert to what they say, "integrate the library," then we are getting down to the question of intent, because when you start talking about integrating something, you can easily be talking about provoking a disturbance of the peace, and it is common knowledge that that's what it has done all over the United States.

By Mr. Bell: I wasn't aware that I had used the word, "integrate," but if I have, I certainly wouldn't mind if the State would concede that the library is segregated, then it would cut some of the crust away from this thing and really get to the issue of the case. If we want to make that concession and concede that the Audubon Regional Library is segregated according to race, that Negroes are excluded, then we might be able to really get down and see what the situation really is.

[fol. 89] By Mr. Kilbourne: Your Honor, I realize that we haven't started getting to the facts of the case, and it looks like we might be a long time doing it, but I am going to have to try to persist in doing it to show the intent.

By the Court: The Court will overrule the objection.

By Mr. Bell: To which ruling of the Court we respectfully except, and ask that a formal Bill be reserved, making the question, the answer and argument of counsel to be a part of the formal Bill.

By Mr. Kilbourne: Will you read the question now?

The Reporter Read the Question.

A. For the same reasons that have been stated before, I refuse to answer that question on the grounds of the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

By Mr. Kilbourne: Your Honor, I certainly ask that the witness be instructed to answer the question.

By Mr. Elie: Your Honor, we object to the same thing. I think it's becoming more and more obvious why it becomes necessary to grant witnesses immunity. It is impossible [fol. 90] for the witness to know just what questions she may answer that will tend to incriminate her. This is the third question that she has refused to answer on her constitutional grounds, and the Court found that in one instance she was correct—

By the Court: I didn't say she was correct, I said I would have to go along with her.

By Mr. Elie: The Court sustained the objection of counsel which means that every time the question is raised, the Court is then and there ruled that it will not tend to incriminate the witness. I think it would make for a much smoother hearing if the Court granted immunity.

By the Court: The Court can not, and will not grant anyone immunity. Immunity is for a special group of people under special circumstances, and certainly I can't see that the witness fits that. I think in this case that the question and the answer very definitely could not incriminate her. Really the question is based so that it has no right to hurt.

By Mr. Bell: With all due respect to the Court, I think [fol. 91] the question asked whether or not other attempts were made to go to other buildings, other than the Audubon Regional Library here—what it appears to me, with all due fairness to the Court, the question presupposes that this witness has some peculiar knowledge that a plan existed that involved Negroes, or other parties, going to all 3 buildings, as suggested by the District Attorney, simultaneously. It presupposes that she has knowledge of the plan, without any plan being charged in the Bill of Indictment, and persons have already been arrested for criminal conduct involving one of these libraries. Apparently the State is trying to elicit information that presupposes the existence of a conspiracy to violate the Law, as written by our Legislature. It appears to me that certainly if this witness has any specialized knowledge, she would be subjecting herself and others to criminal charges on which she has already invoked the Fifth Amendment, which she has a right to do under the Constitution of this country, and I don't think there should be any doubt that she has a right to refuse to answer any questions, based on the grounds that it might [fol. 92] tend to incriminate her. I think it is quite obvious from the quest itself that the question presupposes the existence of a criminal conspiracy. If the conduct on which these persons have been charged is deemed to be permanent, which it has been by the State.

By the Court: Do you re-urge your question?

By Mr. Kilbourne: I do, Your Honor.

By the Court: I will ask you to answer the question if you know the answer.

By Mr. Bell: If the Honorable Judge orders the witness to answer the question over the objection of counsel, and over the interjection of the Fifth Amendment plea by the witness, we would like to respectfully urge a Bill of Exception, making the question as propounded by the District Attorney, the answer of the witness, the objection and argument of counsel along with the ruling of the Court, all a part of the formal Bill of Exception.

A. I would like for permission to speak with my counsel.

By the Court: Mr. Kilbourne, do you have any objection to the witness talking to her attorney?

[fol. 93] By Mr. Kilbourne: No, Your Honor. By now, Your Honor, I think it must be evident to everyone and certainly to the Court that this witness is a hostile witness, and from here on I would ask permission of the Court to ask her leading questions. I don't have any objection for a recess while she confers with her counsel.

By the Court: Sheriff, let's take a 10 minute recess.

10 Minute Recess.

Court Convened.

By Mr. Kilbourne: I would like, Your Honor, for the record to show who the witness' lawyers are.

By Mr. Bell: Your Honor, I don't think it's proper to let the record show who the witness conferred with as her counsel, I don't see where it has any bearing on the case, whatever; it might tend to cloud the situation a little bit, but I don't see where it has any bearing at all on the case.

By the Court: Well, I left the court room, and I don't know.

By the Court:

Q. You are not ashamed to say who your lawyers are, are you?

[fol. 94] A. Well, I have to agree with counsel saying that as a witness, I don't technically have lawyers that I conferred with. If they were asked if they wanted their names put in the record, I guess it's up to them to say whether they want to have their names in or not.

By Mr. Kilbourne: Your Honor, the State is alleging that this witness is a hostile witness, and I think the record should show that she asked permission to confer with her lawyers, and I think the record should show that her lawyers are also the attorneys for these defendants.

By Mr. Elie: Your Honor, Mr. Kilbourne has repeated that this is a hostile witness, I don't believe there is any evidence to indicate that she is a hostile witness; all she says, the questions that she thinks will incriminate her, she refuses to answer. This is not because she is maybe a hostile witness.

By the Court: Well, of course, ethically there may even be a conflict of interest here. I think the record now properly shows who the lawyers are; I think, in fact, that the only lawyers in the court room at this time are the District Attorney and two lawyers for the defendants.

[fol. 95] By Mr. Bell: Well, I don't want to make an issue of it. It's just that I thought, Your Honor, that the fact that we are representing the 5 defendants in the case, and we got the first witness, then to have it go into the record that the witness is our client, without anything else to show that—if the District Attorney wants to pursue the fact that this witness is hostile, and wants to cross-examine her, or something like that, it might be pertinent to prove that fact; but I think until I take the stand, or the witness testifies as to our client-attorney relationship, I don't think it's proper for the record, just on the motion of the District Attorney, to show that we are defending her, because this witness has never been charged with anything, and she doesn't have a lawyer in this matter. She conferred with us, that is true, and I am going to admit that, but I think the mere fact that she conferred with us on a matter that may be referring to her, should not warrant the insertion in this record of the fact that we also represent the witness in this case, unless there is some point in the District Attorney's trying to [fol. 96] prove something.

By Mr. Kilbourne: If Your Honor please, the witness has refused to answer a question, and when the Court ordered her to answer it, she asked that she be allowed to confer with her attorneys, and the Court granted her a 10-minute recess for her to be able to confer with her attorneys. The record already shows that, that's already in the record, and I merely want the record to show who it was that she conferred with.

By the Court: I think the record shows that.

By Mr. Kilbourne: I guess it does.

By the Court: Are you satisfied?

By Mr. Kilbourne: Well, I guess so.

By the Court: We don't know if the attorneys represent her, or if she retained them, but she conferred with them, and that was what the Court granted a recess for.

By Mr. Kilbourne: All right, Your Honor, that's all right. I just ask now that she answer the question.

A. Would you repeat the question?

The Reporter Read the Question.

A. Could you tell me what you mean by, "other branches?"

Q. Yes, the branch at St. Francisville, and the branch at [fol. 97] St. Helena.

A. Are you asking me if there were other attempts to enter them?

Q. The same date as the offense charged against these defendants?

A. Yes, there were.

Q. Was that by members of the Congress of Racial Equality?

A. Well, I am going to refuse to answer that for the same reasons I stated before.

By Mr. Kilbourne: I ask that the witness be instructed to answer the question, Your Honor.

By the Court: The Court will so order you to answer the question if you know that they are members.

By Mr. Bell: Of course, Your Honor, I want to interpose an objection on that on the grounds that the question as to what organization the persons who attempted to enter other branches of the Audubon Regional Library besides the Clinton Branch, is irrelevant and immaterial.

By the Court: The Court will overrule the objection.

By Mr. Bell: I would like to reserve a formal Bill of Exceptions, making the question, the objection of counsel, and [fol. 98] the ruling of the Court all part of the formal Bill of Exceptions. We would also like to except to the Court instructing the witness to answer that question, as the witness has interposed the Fifth Amendment.

By Mr. Kilbourne: I would like to ask the Court to ask counsel if he is making that objection as counsel for the witness, or as counsel for the defendants.

By the Court: I believe the witness has a personal right to that, and she has invoked the Fifth Amendment; the Court gives no weight to it.

By Mr. Bell: I will withdraw the objection to the ruling of the Court requiring the witness to answer. I think the objection and the interposition of the Fifth Amendment by the witness is sufficient on the record to take care of itself.

The Reporter Read the Question.

A. I don't know.

Q. Since you objected to answering that question, since you didn't know whether they were or not, why didn't you answer it in the first place?

By Mr. Elie: If Your Honor please, he has his answer and now he isn't satisfied with the answer, I don't think he can [fol. 99] argue with the witness.

By the Court: I think the question is argumentative, Mr. Kilbourne.

By Mr. Kilbourne: Your Honor, I still want the record to show that the witness is hostile.

By the Court: Do you re-urge the question?

By Mr. Kilbourne: I do re-urge the question.

By the Court: Subject to the objection, will you answer the question.

By Mr. Elie: Your Honor, I respectfully reserve a Bill making the request and the Court's ruling to the objection a part thereof.

A. What is the question again?

Q. Since you have answered that you did not know whether the people who entered the other branches were members of the Congress of Racial Equality, why in the first place, did you object to answering the question?

A. Well, I stated my objection that I was pleading the First, Fifth, and Fourteenth Amendment to the Constitution of the United States, and I believe there were also objections raised by counsel for the defendants.

Q. Isn't it a fact that you just didn't want to answer my questions, isn't that it?

[fol. 100] A. (No answer.)

Q. Isn't that the real reason?

A. I don't understand that question.

Q. What is it that you don't understand about it?

A. What do you mean, that I don't want to answer it?

Q. Did you object to answering that question simply because you don't want to answer the question asked you by the prosecuting attorney in this case?

A. I will state again my reasons for not answering the question, and that statement will stay the same.

Q. The part of the program of the Congress of Racial Equality in this community is what is termed, "integration," is that right, "integration of the races?"

A. I would like to know what that has to do with the order at hand?

By Mr. Kilbourne: I ask that the witness be instructed to answer the question, Your Honor.

By the Court: Answer the question if you know.

A. Could you be a little more detailed?

By Mr. Kilbourne: I ask that you instruct the witness to answer the question, Your Honor.

By the Court:

Q. Do you understand the question?

A. Would you repeat the question?

[fol. 101] The Reporter Read the Question.

A. The program of CORE in any community is to try to work towards a society in which all persons can finally live up to the potentials that they were born with, and all persons have equal opportunities to the facilities of the community so that they can develop their potentials.

By the Court: Do you want her to answer your question?

By Mr. Kilbourne: She hasn't answered it, Your Honor, I wanted her to answer the original question.

A. Well, I thought that the answer to your question was involved in the answer that I gave.

By Mr. Kilbourne: Your Honor, the question that I simply asked her was whether the program of CORE in this community was one of integration of the races—termed "integration of the races?"

A. Well, CORE believes as part of CORE's philosophy that the development of potential cannot proceed if people cannot have equal opportunities to develop themselves in a segregated society, and that CORE is dedicated to settle segregation, and work for an integrated society.

By Mr. Kilbourne: That satisfies me.

Q. Did you give an interview, or did you call the newspapers and give them a report in the Morning Advocate on [fol. 102] the evening the defendants were arrested?

A. I really can't remember.

Q. Well, maybe I can refresh your memory a little bit. I would like to read to you from an article in the Sunday Advocate, March 8, 1964: "A spokesman for CORE said earlier that such a demonstration was planned. Mimi Feingold—" are you also known as "Mimi?"

A. That's right.

Q. —"Mimi Feingold, a CORE task-force worker, said that similar groups of Negroes had attempted to enter public libraries in St. Francisville, in West Feliciana Parish, and at Greensburg, in St. Helena Parish, but were locked out." Is that a correct statement of what you told a newspaper reporter?

A. I didn't say that to a newspaper reporter.

Q. Are you quoted erroneously in this newspaper?

A. No, I am not.

Q. That is a correct statement, then, of what I read to you, what you told someone?

A. Yes, it is.

Q. Did you further make the statement that: "The three libraries, or branches of the Audubon Regional Library, are operated by the tri-parish board, and reserved for use by whites only?"

A. I believe I made a statement similar to that.

Q. Where did you get that information?

By Mr. Bell: At this point, Your Honor, I think we are [fol. 103] getting really far afield here. I don't see where she got the information that was quoted in the newspaper is relative to the issue in this case. I would like to interpose an objection on the grounds that it is irrelevant and immaterial, it has nothing to do with the guilt or innocence of the five defendants; as to what this witness has got to say about information related to the character of certain libraries that exist in or out of the Parish.

By Mr. Kilbourne: Your Honor, I am still trying to get to the intent with which these defendants entered in the library. It has already been characterized in the newspapers by this witness here as a demonstration, and that is the purpose of the question. She said, "it was reserved for use by whites only." I think I should be allowed to find out where she got that information.

By the Court: The Court overrules the objection.

By Mr. Bell: Your Honor, I would like to reserve a Bill, and ask that the question, the answer, argument of counsel, [fol. 104] and ruling of the Court all be made a part of the formal Bill.

Q. Answer the question.

A. Well, I really can't remember because our information comes from many different sources.

Q. Do you know of some colored person who has been refused service at the library?

A. I know five such persons.

Q. Who?

A. Five such persons.

Q. Who are they?

A. The five defendants.

Q. Is it your testimony here today that they were refused service at the library on the day they were arrested?

By Mr. Bell: Your Honor, I am going to object to the District Attorney asking that question unless she has personal knowledge, that she was present at the time that these people were arrested, and that she would know whether or not they were refused service, or what happened. Unless it was shown that she was in that neighborhood, in that vicinity and a witness—

By the Court: I think the objection is probably good, but she has already said that she knew the five defendants who [fol. 105] were arrested.

By Mr. Bell: What I am saying, Your Honor, I think the evidence in part is hearsay and it is not competent.

By the Court: Suppose you lay a little more foundation, Mr. Kilbourne, and find out if she was in a position to know, and if she got the information through hearsay.

By Mr. Kilbourne: Your Honor, I asked her the question if she knew someone that had been refused service, and she said she knew five, and before I could pursue the matter any further I was interrupted by an objection.

By the Court: The Court will overrule the objection.

By Mr. Bell: Your Honor, I would like to reserve a formal Bill of Exception and ask that the question, the argument of counsel, and the ruling of the Court all be made a part of the formal Bill.

Q. You don't know of your own knowledge of any colored person who was refused service at the library, is that correct?

A. That's right.

Q. In the article in the newspaper which you stated is substantially correct, you, as a CORE spokesman said: [fol. 106] "such a demonstration was planned—" what was meant by "demonstration?"

A. Is the CORE spokesman identified?

Q. No.

By Mr. Elie: If Your Honor pleases, since the District Attorney is reading from a newspaper, I am going to have to request that the witness be permitted to see the whole of her statement.

By Mr. Kilbourne: I will be glad to let the witness see the statement.

A. (The witness looked at the statement.)

Q. Will you answer the question? Are you denying that you are the spokesman referred to in that newspaper article?

A. I really don't know; I couldn't say whether I am or not.

Q. Suppose you were the spokesman for that article, will you please tell the Court what you meant by that word, "demonstration?"

By Mr. Elie: Your Honor, I don't see how she can be considered competent to answer the question.

By the Court: I think the objection is good and I will sustain it.

Q. How long have you been a member of CORE?

A. I can't remember exactly, for several years.

Q. In connection with your work as a member of CORE, haven't you, yourself, engaged in frequent demonstrations?

[fol. 107] A. I don't see what that question has to do with this case.

By the Court: You don't want to argue with Mr. Kilbourne.

By Mr. Kilbourne: Your Honor, I ask that the witness be instructed to answer my question.

By the Court: Answer the District Attorney's question.

A. Could you define what you mean by "demonstrations?"

Q. All right, I ask you this: Were you not arrested in Camden, Maryland, in connection with an attempt to integrate a swimming pool, I think in 1962?

A. No, I was not.

Q. Where were you arrested?

By Mr. Elie: Objection, Your Honor, he has not proved that she was ever arrested, and now he is asking where she was arrested. The witness said she has not been arrested, and again he is assuming a fact that has never been proven.

Q. Well, I will ask you this: Have you even been arrested?

By Mr. Elie: Objection again, Your Honor, is the District Attorney attempting to impeach his own witness; there is no relevancy to this case.

By Mr. Kilbourne: Your Honor, I am getting around to try to prove what a "demonstration" is now.

[fol. 108] By the Court: Why don't you rephrase your question to "convicted?"

Q. Have you ever been convicted of taking part in any demonstrations as a member of the Congress of Racial Equality?

A. (No answer.)

By Mr. Bell: We hate to state this objection because we don't want to delay proceeding unduly, but is the District Attorney attempting to impeach his witness, that's what we are trying to find out?

By the Court: The District Attorney had earlier asked the Court to recognize the witness as a hostile witness.

By Mr. Bell: Didn't the Court rule on that? That's what we are trying to find out, if she is a hostile witness. I mean, if she has already been ruled a hostile witness, prior convictions have nothing to do with—

By the Court: I believe that Mr. Kilbourne has said that he is trying to get a definition of what a "demonstration" is in CORE lingo. She said she didn't make the statement to the newspapers, so I sustained your objection on that.

By Mr. Bell: Again I submit, Your Honor, that we might [fol. 109] get a more reliable source, like a dictionary, or an expert on English, or something. I don't think we can qualify this witness as an expert on the English language.

By Mr. Elie: Judge, I just cannot see the relevancy of it. The State is trying to prove that a lot of people are attempting to disturb the peace, and whether the witness is convicted for murder, I don't see that it has anything to do with this case, what does it have to do with the attempt? If she committed murder, that has nothing to do with the attempt.

By the Court: It's now 5:00 o'clock, and I can see us either spending the night or coming back.

By Mr. Elie: I would like to get this over with today if possible, Judge.

By Mr. Kilbourne: Your Honor, I can see that we are going to be here quite a long time with this witness because every time I try to ask her a question, she pretends that she doesn't even know what a "demonstration" is, and she has been a member of the Congress of Racial Equality for nearly 2 years; so I am going to have to take her over and [fol. 110] over until she finally decides to answer these simple questions.

By the Court: Suppose we adjourn until April 9, 1964, at 9:00 A.M.

By Mr. Elie: Your Honor, I would like to ask the Court if possible, because we have been late for Court on several occasions, to open Court at 10:00 instead of 9:00, as it makes it a little hard to get here from New Orleans for 9:00.

By the Court: Court adjourned until 10:00 A.M., April 9, 1964.

[fol. 111]

Court Convened at 10:00 A.M., April 9, 1964.

By the Court: In the case of "State of Louisiana vs Henry Brown, et al," is counsel present?

By Mr. Kilbourne: Plaintiff is present and ready to proceed.

By Mr. Bell: Defendants are ready, Your Honor, Robert F. Collins, and Murphy Bell are representing the defendants today, Your Honor.

By Mr. Kilbourne: I wish to call Miriam Feingold to the stand.

By the Court: You have already been sworn, you remain under oath for the remainder of the case.

Direct examination.

By Mr. Kilbourne:

Q. Was there any particular reason for these defendants going to the Library on a Saturday morning?

A. You mean on a Saturday as opposed to any other day?

Q. Yes?

A. No, I don't.

Q. Was there any advance notice given any public officials or law enforcement officials that this entry of the

Library by the defendants was going to be made on the day it was made?

By Mr. Bell: We object, Your Honor.

[fol. 112] By Mr. Collins: This line of questioning presupposes that this witness is the spokesman for, and knows all about what was involved in this particular incident; therefore, we object on the basis that no proper foundation has been laid.

By the Court: I believe the question was, "did she know?"

By Mr. Kilbourne: I believe the foundation was laid the last time the case was heard at which time this particular counsel wasn't present.

By the Court: The Court overrules the objection.

A. No, I don't know of any.

Q. Do you know who notified the Federal Bureau of Investigation that this entry was going to be made in the Library?

By Mr. Bell: Your Honor, I don't want to belabor with too many objections, but there is nothing in the record to show that the F. B. I. was notified, so I don't think that is a proper question. If the record would show that the F. B. I. was notified, then this maybe would be an answerable question.

By Mr. Kilbourne: Your Honor, he is requiring me to put my evidence on in a certain method, and I don't think [fol. 113] the State requires me to do that, I don't think it requires it in any particular order.

By the Court: The Court overrules the objection.

A. I honestly can't remember who notified them.

Q. I take it from your answers that you know that the Federal Bureau of Investigation was notified?

A. Well, I can't be sure of that, I really can't remember.

Q. Is your answer that you don't know, or that you can't remember?

A. I can't remember.

Offer in Evidence

By Mr. Kilbourne: If Your Honor please, in connection with the witness' testimony, the State wishes to offer, produce and file into evidence page 2-A of the Baton Rouge Sunday Advocate of March 8, 1964, and with particular reference to the article: "Clinton Library sit-in nets 5 arrests," to be identified as "State #1."

By Mr. Bell: Your Honor, of course we are going to object on the ground, first, that it's not relevant; second, that I don't think this particular article is anything more than hearsay, it doesn't identify who wrote it; and third, it just has no relevancy to the guilt or innocence of the [fol. 114] accused. I don't see what this line of questioning is going to do.

By the Court: I think we probably have covered that previously, but since your objection I will reserve a ruling on it until he lays more foundation.

By Mr. Bell: Of course, I would like to further call to the Court's attention the fact that this witness has never identified this particular article—

By the Court: The Court has already ruled. The Court reserves its ruling subject to further foundation by the State.

By Mr. Kilbourne: If Your Honor please, my recollection is that the witness testified the last time we were in Court that the article was substantially correct, that it was a representation of her interview with a reporter of the Baton Rouge paper.

By the Court: I think substantially that was correct, but since counsel is again objecting, I suggest that you go back and re-lay your foundation on it.

By Mr. Kilbourne: If Your Honor please, I am satisfied with what is in the record. If I am wrong, the Court can [fol. 115] throw it out, but it takes so much time to get this witness to answer a question, I just don't like to waste any more time trying to get her to answer it; I think she has answered it.

By the Court: I reserved a ruling because I thought she had identified the report except for several words in it, and said it was substantially what she had related. I don't know exactly, but according to my notes here—I am trying to remember what did happen. If the State is satisfied—

By Mr. Kilbourne: I am satisfied, Your Honor, without belaboring the matter further, and I tender the witness.

By Mr. Bell: We would like to take a Bill of Exceptions, marking part of the Bill of Exception, the State's introduction marked "State #1," and the testimony of the witness, and ask that it all be made a part of the Bill of Exception.

By the Court: You are asking for the testimony previous to this, or the record?

By Mr. Bell: The record, and the statement be made a part of the Bill of Exception.

[fol. 116] By the Court: Let the offering then be received, filed and identified as "State #1."

By Mr. Bell: No questions, Your Honor.

By Mr. Kilbourne: I call Mrs. Reeves to the stand, please.

[fol. 117] The witness, Mrs. Katie Reeves, after first having been duly sworn to tell the truth, the whole truth, and nothing but the truth, so help her God, testified as follows:

Direct examination.

By Mr. Kilbourne:

Q. Will you state your name for the record, please?

A. Katie Reeves.

Q. K-a-t-i-e?

A. Yes.

Q. R-e-e-v-e-s?

A. Yes.

Q. Mrs. Reeves, what is your occupation? I know you are a housewife, but what else do you do?

A. I am Branch Assistant at the Audubon Regional Library.

Q. In that capacity, what are your duties?

A. To assist people who come into the Library to select their books; check out the books to them; to keep the shelves in order, and to keep a record of the circulation of the day.

Q. This is a case of the State of Louisiana prosecuting Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith and Cleveland McKinzie for disturbing the peace on the 7th of March, 1964, in regard to an incident at the Library. I first ask you this question: Do you know any of these defendants?

A. Only one, Henry Brown.

Q. Do you see Henry Brown in Court?

A. Yes, right there (indicating).

Q. Stand up please (to Henry Brown). Is that Henry Brown?

A. Yes, sir.

[fol. 118] Q. Do you know any of the other defendants?

A. No, sir, I can't identify any of them.

Q. Have you seen any of the other defendants before?

A. Not that I know of.

Q. Will you relate to the Court what happened on the morning of the 7th of March, which was a Saturday, that resulted in this charge?

A. Yes. These 4 came to the Library.

Q. How many?

A. Four and Henry Brown, 5 altogether. I met them between the tables, and I asked if I could help. He gave me the name of a book that he wanted; I checked the card catalogue to see if we had the book, but we did not have the book, so I told him we would have to ask the State Library for the book, and he would be notified when we received the book from the State, and he could either pick it up or it would be mailed to him, that it would be Monday or Tuesday.

Q. What happened then?

A. Since we did not have the book I had assumed that they would leave, they did not. I repeated what I had said, and then I asked them to leave, they did not; so then I called Mrs. Perkins and she came in and said essentially the same thing, and also asked them to leave.

Q. Did they leave?

A. No, sir, they did not.

Q. What did they say, if anything, or did any of them say anything when they were asked to leave?

[fol. 119] A. No, sir, I don't think so.

Q. Did anyone ask for a book besides Henry Brown?

A. No, sir.

Q. Will you describe the commotion in the Library when these defendants came in—just describe it as best you can?

A. As you enter the door to the left are bookshelves, a table, and a card catalogue; straight ahead of you is the stove; to your right is a table and bookshelves, and a desk and chair.

Q. Does that open on to the street?

A. Yes, sir.

Q. On to the sidewalk?

A. Yes, sir, on to the sidewalk.

Q. That building is located where, Mrs. Reeves?

A. Across the street from the Court House.

Q. That is on the north side of the Court House?

A. Yes, sir.

Q. When the defendants were asked to leave, you already testified that they didn't say anything, did they do anything?

A. No, they just sat there, at least Henry Brown sat, the others were standing. He sat down when I went to the card catalogue to check to see if we had the book.

Q. About what time of day was it, Mrs. Reeves?

A. I would say around 20 minutes to 12:00, at least 11:30 or a quarter to 12:00.

Q. Were you alone in the room at the time?

A. Yes, sir.

[fol. 120] By Mr. Kilbourne: I tender the witness.

Cross examination.

By Mr. Bell:

XQ. Mrs. Reeves, what is the name of the book that one of the accused asked for?

A. I copied it from the paper he handed me, "Wendall Arna, the Story of the Negro: Bontems."

XQ. Did he not ask for another book later on?

A. I don't think so.

XQ. Do you recall one of the accused asking for the Story of the Constitution, a book on the United States Constitution?

A. He did not ask me for it.

XQ. Were you present when he asked someone else for it?

A. He did not exactly ask for it.

XQ. There was some conversation regarding the book on the Constitution, is that not correct?

A. Yes, sir, he said, "How about the Constitution?"

XQ. But he did not ask you that directly?

A. He did not ask me.

XQ. I think you testified on direct that no one said anything, other than the accused, that is what you were talking about?

A. That's right, he was the one doing the talking.

XQ. Was there any noise or boisterous talking?

A. No.

XQ. Everybody was seated?

A. Henry Brown was seated, the others were standing.

[fol. 121] XQ. Can you identify any of the other accused?

A. I don't think I can.

XQ. The only one you can identify is Henry Brown?

A. Yes, Henry Brown.

XQ. How many times did you ask all of the accused to leave?

A. Twice.

XQ. Did you address just Henry Brown, or did you address all 5 of them?

A. They were all together, I assumed that I was addressing all of them, I did not call anyone by name.

XQ. But you merely directed your words to the person you was talking to, which was Henry Brown, is that correct?

A. I was talking to him in connection with the book that he had ordered, my other conversation was in reference to all of them as I did not know any names.

XQ. Mrs. Reeves, did you mention anything to Henry Brown about a policy or regulation of the Audubon Regional Library?

A. I think I said that his point of service was a bookmobile or it could be mailed to him.

XQ. Can you explain that, Mrs. Reeves? What do you mean by, "point of service"?

A. He could pick up his book at the bookmobile, or he could have it mailed to him.

XQ. By that you meant that he could not be served in the Library itself?

A. He could pick it up, yes, he probably would have that day had we had the book.

[fol. 122] XQ. Did you not mention to him that the rules of the Library prohibited him from being served at this particular point of service?

A. I did not.

XQ. You did not do that?

A. No, I did not.

XQ. Did you suggest to him that he could get his book from the bookmobile rather than at this particular Library?

A. He could not have gotten this particular book from the bookmobile because we do not have the book for which he asked.

XQ. I understand that. And he did not request the book on the Constitution from you so you don't know anything about that?

A. No.

XQ. Did you ever send this particular book to Henry Brown?

A. I did not, when we do not have the book, I take the request on a slip of paper and then I give it to someone else and they check it out; and when it comes in, it is mailed or they are notified.

XQ. But you did take this order?

A. I did take this order and process it as usual.

XQ. Is that the usual procedure, if a person makes a request to you directly, that you would mail the book out to them, or you would have them pick it up; what is the usual procedure?

A. That they would pick it up, or we would mail it, either way.

XQ. In the absence of any directions, do you usually mail the book, or would you request that they pick it up?

A. (No answer.)

[fol. 123] XQ. The reason I am asking that question, Mrs. Reeves, is because I believe we have a book here that was mailed to Henry Brown from the Audubon Regional Library, and I don't know whether or not this was mailed. I ask you to identify this book and ask you whether this book came through your Library?

A. (Witness looked at the book) I cannot say, I do nothing with the book after I take the request until they are handed to me.

XQ. Do you remember mailing this card?

A. I do not.

XQ. Have you seen that card before?

A. I have not.

By Mr. Bell: Thank you, Mrs. Reeves.

Re-direct examination.

By Mr. Kilbourne:

Q. Mrs. Reeves, I wanted to ask you about this book again, what was the title of this book? Before I ask you that, did he hand you a slip of paper with the book written on it?

A. Yes, he did.

Q. Did he say, "I would like to get this book"?

A. He said, "I would like to get this book," and he handed me a slip of paper.

Q. What was the name of that book again?

A. Wendall Arna.

Q. Would you spell that, please, ma'am?

A. W-e-n-d-a-l-l.

[fol. 124] Q. What was the other word?

A. A-r-n-a, The Story of the Negro: Bontems.

Q. Had you ever heard of that book before?

A. I never had.

Q. Do you know whether or not there is such a book?

A. We did not show it in the card catalogue—that would be my way of seeing if we owned the book.

Q. The card catalogue, what does that show, the books that you actually have in the Library, or the ones that are available?

A. The ones that are available in this region.

Q. When they came in, was the door shut to the Library?

A. Yes.

Q. Does the Library have a screen-door, and then a wooden-door in front of it?

A. Yes.

Q. Both of those, the screen-door and the wooden-door was shut?

A. Yes.

Q. Is that the usual practice?

A. Yes, sir, especially if it was cool, or hot if it was hot because the air-conditioners regulate it.

Q. It would be your testimony that ordinarily both were closed?

A. Yes, ordinarily both were closed.

Q. Describe as best you can, how the defendants came in, were they in the same order, were they right together; who came in first?

A. I can't say because they all seemed to come in at one time, as a group.

[fol. 125] Q. They came in as a group?
A. Yes, sir.

By Mr. Kilbourne: If Your Honor please, I would ask that all of the defendants stand up.

The Defendants Stood Up.

Q. Can you identify any of them, other than the one you have already identified?
A. I don't think so.

By Mr. Kilbourne: That's all I have, thank you, Mrs. Reeves.

Re-cross examination.

By Mr. Bell:

XQ. Mrs. Reeves, you said you have a table in this Library with some chairs?
A. Two tables.
XQ. What are these tables used for?
A. Book-display and magazines.
XQ. Isn't it the policy of the Library to allow the public to read in the Library if they care to?
A. I suppose so, but not many people do.
XQ. But they normally would use these tables and chairs to read if they cared to do so quietly?
A. I suppose so.
XQ. I mean as far as you know, there is no rule against a citizen reading a book in the Library if a citizen cared to? Assuming that the Library had the book a citizen wanted?
[fol. 126] A. I suppose they would, very few people read; if a book is there and they want it, they take it and go.
XQ. What type of books do they have in the Library that's available for the public to take out: I would like to rephrase that question: Do you have any reference books that are not available to a citizen to take from the Library, you have to use it right at the Library?
A. Yes.

XQ. You have books like that?

A. Yes, we do.

XQ. Normally, if a person wanted to see one of those books they would have to look at it and get what information they wanted inside the Library?

A. I assume you are talking about reference books, we take requests by phone, and we give information citing the source.

By Mr. Bell: Thank you, Mrs. Reeves.

Re-direct examination.

By Mr. Kilbourne:

Q. Mrs. Reeves, did any of these defendants indicate any desire for any reference book, or anything of that kind?

A. No, sir.

Q. Did they indicate a desire to read anything in the Library?

A. No, sir.

By Mr. Kilbourne: That's all.

By the Court:

Q. Mrs. Reeves, how old is the Library, do you know?

A. I really couldn't say definitely, I would think since [fol. 127] 1961, but I couldn't say definitely because I don't know.

By the Court: That's all.

Witness Excused.

By Mr. Kilbourne: I call Mrs. Marshall Perkins.

[fol. 128] The witness, Mrs. MARSHALL PERKINS, after first having been duly sworn to tell the truth, the whole truth, and nothing but the truth, so help her God, testified as follows:

Direct examination.

By Mr. Kilbourne:

Q. Will you state your name for the record, please?

A. Mrs. Marshall Perkins.

Q. What is your connection with Audubon Regional Library?

A. I am Regional Librarian.

Q. Tell the Court what the Regional Library is? What does it consist of?

A. The Audubon Regional Library is a library operated jointly by 2 Parishes, its points of service are 3 branches and 2 bookmobiles.

Q. Is there a main Library, or main facility?

A. There is no main Library as such, there is a headquarters maintained at Clinton. The headquarters is not located in the branch, it is located behind the branch and is not open to the public.

Q. What portion of the headquarters is open to the public?

A. The portion that is open to the public is the room in which you enter from the street on the west side, and there is a children's room open to the public, and a small room which maintains magazines. We do not maintain a reading-room, as such, we do not have the space for it.

Q. Mrs. Perkins, were you present on the 7th of March, I believe it was, when the incident occurred which resulted [fol. 129] in the charges we are prosecuting against the defendants present in the court room today?

A. I was not present in the room at the time they entered, no, I was in my office at the time.

Q. What first attracted your attention to the situation?

A. Mrs. Reeves came in and told me that she had asked the people to leave, and they had not done so.

Q. So then what did you do?

A. I went out to talk to them myself.

Q. Did you know any of them?

A. Not before that time, no.

Q. Do I understand your answer to be that you had never seen any of the defendants before?

A. That's right.

Q. To your knowledge had they ever made any requests for any books in the Library before?

A. I would not necessarily be in a position to know this, I do not handle all of the books if they can be filled within the Regional; I only answer those requests that we do not own, and I decide whether we will purchase the book, or whether we will try to borrow the book from the State Library, or from L.S.U., or from Tulane.

Q. When you went into the—I will call it for convenience sake the lobby—

A. It's adult reading-room, the adult service-room.

Q. You are talking about the same room I call the lobby?

A. Yes.

[fol. 130] Q. When you went into the room, what did you see?

A. I saw the 5 people and Mrs. Reeves.

Q. What were the 5 people doing?

A. One of the 5 people were seated, and the others were standing.

Q. What did you say to them, if anything?

A. I said that I understood that Mrs. Reeves had asked them to leave, and she had given me the request, and I didn't know whether they had misunderstood about me having taken the request.

Q. When you asked them that, did anyone say anything?

A. I asked if he had asked for the book before, I believe the question was.

Q. Who did you address that to, Mrs. Perkins?

A. To Henry Brown.

Q. What was his answer?

A. He said no, he hadn't. Excuse me, he said he had asked for it at the Blue Bookmobile.

Q. Had you ever heard of the book before?

A. Not this particular book, no.

Q. I understand that the book was sent to Henry Brown?

A. That is correct.

Q. Was that the book that he asked for?

A. We assumed that it was, the report we got from the State Library was that the book that he wanted was a book by Arna Bontemps, which was called, "The Story of the Negro."

Q. That wasn't exactly the book that he asked for?

[fol. 131] A. No, it was not, I have that request if you would like to see it?

Q. I would like to see it, please, ma'am.

A. This is the way we take them (handing the request to Mr. Kilbourne).

Q. As I understand it, this isn't the one that he gave you?

A. No, it isn't, he retained that slip. Usually people who ask for books want their information back.

Q. The book that he actually asked for, were you able to locate it at all?

A. No, sir.

Q. What transpired then after the incident that you have already related?

A. What do you mean?

Q. Did something come up about the Constitution?

A. Yes, something came up about the Constitution, but not what I would call a request.

Q. What came up?

A. What was said was this: Henry Brown said, "what about the Constitution?" I assumed that he meant did we have it in the Library, on the heels of the other. I said, "we own copies of it, yes," but he did not request the Constitution.

Q. Did any of the other defendants say anything to you?

A. No, sir.

Q. Did they say anything to anyone, did they speak to the best of your recollection?

A. I have no recollection of that.

[fol. 132] Q. Did you ask them to leave?

A. Yes, sir.

Q. I know you can't remember the exact words, but do you remember what you said to them?

A. The gist of it was they had been asked to leave by Mrs. Reeves; Mrs. Reeves is in charge of the Branch, and they did not comply with her request. I also asked them to leave, saying that the one who seemed to want something had been served.

Q. What did they do then?

A. Nothing.

Q. Did they leave?

A. No, sir.

Q. Did they say anything about them not going to leave?

A. I don't think they did at that point.

Q. At any time, was anything said to that effect?

A. After the Deputies came to the Library, there was something said, yes.

Q. What was that?

By Mr. Bell: Your Honor, I don't think the witness can testify to hearsay.

By Mr. Kilbourne: According to the Res Gestae, Your Honor.

By the Court: Lay a little more foundation.

Q. What we are talking about, did it all take place in the Library within a short time, and were these defendants all [fol. 133] present?

A. Please?

Q. You mentioned when the deputies got there, were they still there?

A. Oh, yes.

By Mr. Bell: I was trying to find out, Your Honor, if the witness has identified all of the accused. I am not quite sure that she identified all of them.

By Mr. Kilbourne: Will the 5 defendants stand up again?

The Defendants Stood Up.

Q. Can you identify the 5 defendants, Mrs. Perkins?

A. You mean, can I identify them by name?

Q. I don't suppose you know the name of them?

A. I don't, no, sir.

Q. You recognized them as being the same people who were over at the Library?

A. Yes, I can be sure about the first, the third, the fourth, and the fifth, in order from this end. I cannot be certain about the second.

Q. There were 5 colored males there?

A. Yes, sir, that is correct.

By Mr. Bell: Your Honor, in view of the fact that she could not identify all 5 of them, I would still submit that the testimony as to hearsay under the Res Gestae Rule would [fol. 134] not be permissable at this point.

By the Court: The Court overrules the objection.

Q. What was said by the defendants, or by any of them, during the time the Sheriff or the Deputies were there?

A. I think what they said was—what Henry Brown said was, that he was not going to leave the Library, substantially that was it.

Q. Approximately how long had these defendants been there before the arrival at the Library of the Officers?

A. I don't really know, it could have been 10 or 15 minutes.

Q. Did you call the Sheriff yourself?

A. No, I did not.

Q. Did someone call from the Library?

A. No, sir, I started to, I had asked for a telephone book.

By Mr. Kilbourne: I tender the witness.

Cross examination.

By Mr. Collins:

XQ. Mrs. Perkins, isn't it a fact that it is Parish policy that Negroes not be served at the Audubon Regional Library?

A. That is not correct.

XQ. Isn't it a matter of fact that you told the 5 defendants in this case on the occasion on which they were arrested that they could not be served at the Audubon Regional Library?

A. They were served.

[fol. 135] XQ. They were served?

A. They were served. Any time you do not have a book, you cannot give it to the person; you take the request and you do your best to get the person the book, that's the policy at the Audubon Regional.

XQ. Isn't is a fact that the defendant, Henry Brown, asked you for a book on the Constitution of the United States?

A. He did not ask me for a book on the Constitution of the United States.

XQ. Didn't you previously testify that he asked you about the Constitution?

A. He said to me, "what about the Constitution?"

XQ. To which your reply was?

A. That we owned it, that we owned a copy, that we owned several copies.

XQ. Isn't it a fact that at that point that you could not serve him from the Library?

A. I did not.

XQ. You have reference books in this library, isn't that correct, Mrs. Perkins?

A. A few.

XQ. In order to use these reference books, isn't is a fact that you have to use them on the premises?

A. Sometimes we loan out reference books, yes.

XQ. Isn't it a fact that you also have tables present in this room that has been referred to variously as a library, as the adult reading room, and by various other names?

[fol. 136] A. We have tables there, yes.

XQ. Isn't it a fact that the tables in the library is used for the reference books, by persons sitting at the tables in this particular room?

A. On occasion they have, yes, but not sitting in that particular room, there is only one chair in there.

XQ. Where does a person usually sit?

A. Where?

XQ. Could not an individual who wanted to use the reference books sit in the room on that particular chair that you are talking about, at the table?

A. If you are going to use reference sets as such, the information that you are wanting is usually brief, and therefore you could read in reference books like the Encyclopedias, World Almanac, and things like that; and these are factual, brief things, they do not take extensive reading.

XQ. Do you have the Encyclopedia Britannica?

A. I don't think we have it in the branch here.

XQ. Do you have any Encyclopedias in the branch?

A. Yes.

XQ. Which Encyclopedias do you have?

A. I believe we have the Americana here.

XQ. Isn't is a fact that if a person wanted to copy information from one of these reference books, they might find it necessary to sit down to take notes from that reference book, and that sort of thing?

A. I suppose so.

[fol. 137] XQ. And I presume that you do provide the facility of the table and chair for that purpose, is that not correct?

A. Not necessarily.

XQ. In other words, it could be used for that purpose?

A. You could stand there at one of the tables and write the information down, but not many people could be accommodated to sit down because there is only one chair, and the bulk of those 2 tables is used for display.

XQ. Mrs. Perkins, what 3 Parishes does the Audubon Regional Library cover?

A. East Feliciana, St. Helena, and West Feliciana.

XQ. Mrs. Perkins, there are branch libraries in each of the 3 Parishes, are there not?

A. Yes.

XQ. And there are also 2 Bookmobiles, is that correct?

A. That's correct.

XQ. Isn't it a fact that one serves the Negro residents, and one of these Bookmobiles serves the white residents?

A. One of them operates in those areas, yes.

XQ. One operates in the Negro area, and one operates in the white area?

A. In other words, I don't know whether you realize this or not, but the major portion of our schedule is taken up in serving schools, we serve 33 schools in these 3 Parishes with those Bookmobiles.

XQ. I ask that you answer the question. Isn't it a fact that one of these Bookmobiles serve Negro areas, and one [fol. 138] serves white areas?

By Mr. Kilbourne: Your Honor, let me say this, this is cross-examination, I know, but I think we have gone far afield when we get off on Bookmobiles. I think maybe that counsel is now trying a Civil Suit which we filed in the Federal Court, and I don't want to get involved in that this morning; we are only trying this alleged disturbance that took place over at the Audubon Regional Library.

By Mr. Collins: Your Honor, the purpose of this cross-examination is to get at the real facts of exactly what's been going on in reference to using this particular Library, regarding the use of this Library and the policy of this Library.

By the Court: Why don't you ask the witness if she knows of any Negroes that have been refused books there?

By Mr. Collins: Well, Your Honor, on cross-examination, of course, the witness may not be direct in the answer, sometimes you have to approach it other ways to try to get at the point that you are trying to make.

By the Court: That isn't material at all, the only case [fol. 139] here is Disturbing the Peace. I sustain the State's objection.

XQ. At the time of this incident, Mrs. Perkins, do I understand your testimony to be that there was only one chair in this reading room of the library where these people were?

A. Other than the desk-chair, yes.

XQ. Were there any tables in the room at the time?

A. Two.

XQ. Two tables and one chair?

A. Yes.

XQ. And there were open book-shelves in this room?

A. That's right.

XQ. Was it the policy of the Library to permit patrons of the Library to browse among these books?

A. Yes.

XQ. Did these defendants have that same privilege as any other citizens?

A. They didn't use it, they could have.

XQ. Did they have the same privilege as any other citizen?

A. Yes.

XQ. Do they still have the same privilege of going to this Library and browsing among the books, and requesting service in this Library as any other citizen?

A. In what respect?

XQ. Do these defendants, and did they at the time of this incident, have the same privilege as any other citizen in using the books of the Audubon Regional Library in [fol. 140] Clinton, Louisiana?

A. Any book in this Library is available to any citizen of this region who is a resident.

XQ. And any citizen of this region can come into that Library and sit down there as any other citizen, is that correct?

A. Well, not very many can.

XQ. We are talking about individual cases.

A. A single person could, yes.

XQ. And any one of these defendants could, is that correct?

A. If they are registered borrowers of the Library, yes.

XQ. Can they also browse around in this Library?

A. If they were registered to borrow books, yes.

XQ. And in order to register, all you have to do is to go up to the desk and give the Librarian your name?

A. You have to fill out a borrower's card.

XQ. Fill out a card?

A. And it would have to be checked against the other branches of the region to determine if they had a card unless they could produce an I.D. card, an identification card which shows that they are registered by the Audubon

Regional Library. In other words, they could not borrow a book on that day.

XQ. In other words, it's your testimony that there were no racial restrictions, there were none at that time, and there are none now, with references to the use of any of the facilities of the Audubon Regional Library, is that a fact?

By Mr. Kilbourne: I object to that, Your Honor.

[fol. 141] By the Court: Sustain the objection.

By Mr. Collins: Your Honor, counsel for the defendants respectfully reserves a Bill of Exceptions, making the testimony of the witness, and the question part of the record. Your Honor, I don't think that we can get to the heart of the question.

By the Court: I don't understand what you mean by "heart" of it, but we are not trying a race-case, we are trying a Disturbing the Peace case, a simple little misdemeanor case. Let's not belabor it any more, let's get ahead with the case at hand.

XQ. Mrs. Perkins, I show you what purports to be a postcard of the United States Postal Service, postmarked Clinton, March 28, 1964, addressed to Henry Brown, Jackson, Louisiana, which reads as follows: "Memo to Henry Brown from the Audubon Regional Library, Bookmobile #2." "We are mailing to you under separate cover the copy of Arna Bontemps The Story of the Negro. Neither the Audubon or the State Library could verify such a title by Wendall. We hope that this is the book you want. You may return the book either by mail or to the Blue Bookmobile, whichever way is most convenient." Is this card sent by your Audubon Regional Library?

A. We sent such a card, yes.

XQ. And you can identify this?

A. Yes—

[fol. 142]

Offers in Evidence

By Mr. Collins: In connection with the testimony of the witness, I would like to offer, introduce and file in evidence this—

A. —I assume this is the card we sent. We send such notices when the book is not exactly the same title and author as the patron asks, in order to clarify the fact that we are not able to supply such a book—probably there would be such a book, but neither did the Audubon Regional Library's bibliography file show, nor did the State Library's bibliography file show that they had such a title by Wendall; otherwise, had we found the book by Wendall, we would not have sent the card, we would have sent the book.

By Mr. Collins: Your Honor, in connection with the testimony of the witness, I would like to offer, introduce and file into evidence this postcard and ask that it be marked for identification, "Defendants #1."

By the Court: Any objection to the offering? Let it be received, filed in evidence and identified as "Defendants Exhibit #1."

XQ. I show you what purports to be a mailing-jacket with the United States postmark on it, addressed to Henry Brown, Jackson, Louisiana, stamped March 29, 1964, which has the notation: "Library material from the Audubon [fol. 143] Regional Library, Clinton, Louisiana," and I ask you if you can identify this as being the kind of wrapper in which you mail books to the patrons of the Library?

A. The jacket is not exactly the kind that we mail, we mail just whatever we have. In other words, we cannot afford to buy such material; however, the mailing-label is ours, yes.

XQ. Are you in a position to identify this as something that was mailed from the Audubon Library?

A. Yes.

XQ. I show you a book which is entitled: "The Story of the Negro, by Arna Bontemps," published in New York, 1948, and ask you if you know whether or not this book was sent from the Audubon Regional Library to Henry Brown?

A. It was mailed from the Audubon Regional Library, and borrowed from the State Library.

By Mr. Collins: In connection with the witness' testimony, I would like to ask that the mailing-jacket of this book be marked for identification, "Defendants #2," and that it be introduced in evidence; and that the book identified as "The Story of the Negro by Arna Bontemps," be marked for identification as "Defendants #3."

By Mr. Kilbourne: Your Honor, I am going to object to the offering of the book into evidence because the book [fol. 144] belongs to the Library, and I don't think there is any necessity for it, somebody might want to read it, the title is there, it speaks for itself.

By the Court: I think this, that we can permit the offering of the book and permit it to be withdrawn and returned to circulation.

By Mr. Kilbourne: That's satisfactory with me.

By Mr. Collins: Thank you, Your Honor. I have offered these, and I ask that the mailing-jacket be identified as "Defendants #2," and the book as "Defendants #3."

By the Court: Let the mailing-jacket be so marked as "Defendants #2," and received in evidence; and the Library book, "The Story of the Negro," be received as "Defendants #3," with leave of Court granted to return the book to circulation at the Audubon Regional Library.

XQ. Mrs. Perkins, on this card which was sent to Henry Brown, the following statement is made: "You may return the book either by mail or to the Blue Bookmobile, whichever will be the most convenient." What is the significance of that statement?

A. Patrons who live out of Town are always given this choice.

[fol. 145] XQ. Isn't it a fact that the purpose of this card was to preclude the defendant from returning to the Audubon Regional Library?

By Mr. Kilbourne: If Your Honor please, I object, I suggest that the card speaks for itself.

By the Court: Sustain the objection.

XQ. Isn't it a fact, Mrs. Perkins, that the Blue Bookmobile was the one that was designated to be used by Negroes only?

By Mr. Kilbourne: I object, Your Honor, its irrelevant.
By the Court: Sustain the objection.
By Mr. Collins: To which ruling of the Court, counsel for the defendants respectfully reserve a Bill of Exceptions, making the question, and the record a part thereof.
By Mr. Collins: That's all I have.

Cross examination.

By Mr. Bell:

XQ. One question more, Your Honor, I think the witness testified on direct, or on cross, that the Audubon Regional Library owned 2 Bookmobiles, is that not correct, Mrs. Perkins?
A. We do not own, we have the use thereof, yes.
XQ. Who owns the machines, Mrs. Perkins?
A. The Bookmobiles are loaned to the Audubon Regional Library by the Louisiana State Library.
[fol. 146] XQ. In the card that was introduced, you referred to one of them as "Blue", what is the color of the other Bookmobile, Mrs. Perkins?
A. It is red, you mean the Blue and the Red?
XQ. Yes. You have a Red Bookmobile, and a Blue Bookmobile, is that correct, that services the Audubon Regional Parishes?
A. Yes.
XQ. I think you mentioned that they serve 33 schools, that's both the white and colored schools, is that correct, Mrs. Perkins?
A. Yes.
XQ. In the postcard you specified that Henry Brown return this particular book, "The Story of the Negro, by Arna Bontemps," either by mail or to the Blue Bookmobile, is that correct?
A. I did not specify, I said, "may."

XQ. "You may return the book either by mail or to the Blue Bookmobile?"

A. Yes.

XQ. You did not mean to imply by that statement that he could not return it to the Red Bookmobile?

A. "May" is permissive.

XQ. "May?"

A. Yes.

By Mr. Bell: Thank you, Mrs. Perkins.

Witness excused.

[fol. 147] The witness, SHERIFF ARCH V. DOUGHTY, after first having been duly sworn to tell the truth, the whole truth, and nothing but the truth, so help him God, testified as follows:

Direct examination.

By Mr. Kilbourne:

Q. Please state your name for the record?

A. Arch V. Doughty.

Q. Sheriff Doughty, did you have an occasion to arrest the defendants in this case on the 7th of March at the Audubon Regional Library here in Clinton?

A. I did.

Q. Do you recall about what time that was?

A. Right around 11:00 or 11:30, I believe, between 11:00 and 12:00.

Q. Would you tell the Court just what you found when you got to the Regional Library?

A. When I got there, I believe a couple of the Deputies were there already, Mrs. Perkins, Mrs. Reeves; and the 5 defendants were in the building, Henry Brown was sitting at a table or desk. Mrs. Perkins told me that she had taken an application—or someone had taken an application, and had asked them to leave. I, in turn asked them to leave, and Henry Brown more or less acted as a spokesman for them, he said that it was a public library, and he wanted service there. I asked him the specific question, if he would leave, and he said that he wouldn't, and I asked the others if that was their decision also, and they said it was that they were [fol. 148] going to say with him, and then I arrested them.

Q. Sheriff, did you recall questioning some of these defendants at the jail afterwards?

A. Yes, sir.

Q. Do you recall—I will ask the question this way: Did you test the ability of one of these defendants to read?

A. Yes, I did.

Q. Do you know which one it was?

A. I believe it was this one over here, on this end, right here, I don't know his name. I picked up a little piece of printed matter that was on the jailer's desk, I think it had to do with the Junior Baseball Program. He said that he had been to the Regional Library to check out a book he wanted to read, and I offered him this printed matter, and picked a paragraph I wanted him to read, and I told him to read it, to start at the top of it. He looked at it quite a while and made out a few words on it, it seemed to be pretty much of a task for him to read what was there; in fact he said it would have been very hard for him to read it.

Q. Had you had some advance notice that some sort of demonstration was to take place at the Library?

A. Yes, sir, I did. Normally in the past, someone affiliated with CORE usually calls when they are going to picket.

Q. When you say "CORE" do you mean the Congress of Racial Equality?

A. Yes, sir, the Congress of Racial Equality, and they [fol. 149] tell me when they are going to demonstrate or picket, or whatever they intend to do, and ask for police protection. This particular day no one called me from CORE, or from anyone who had connection with the Congress of Racial Equality. I believe the first information I had on it was from Deputy Kent that they were going to sit-in, or that something was going to take place at the Library that morning. I was standing where I could see the Library, as a matter of fact, I was at my place of business when I saw these 5 colored males coming down the street from an easterly direction towards the Library. Henry Brown was in front of them and he walked up to the library-door and entered first and the other 4 followed him. I called the jail to notify the Deputies that the people had gone in there and I didn't know what for, and I got there immediately after the Deputies got there.

Q. Approximately what time was it that you got this notice that some sort of demonstration was going to take place at the Library?

A. I think it was about 9:00 o'clock because I had expected it all morning after I got the notice, and I remember it was close to noon and nothing had happened until I saw them coming down the street.

Q. You say you saw them coming down the street, Sheriff, which way were they coming from—where were they when you first saw them?

A. They were about in front of Attorney Van Buskirk's [fol. 150] office when I saw them on the sidewalk walking towards the Library.

Q. Were they in a group?

A. Yes, sir.

Q. Do you recognize Henry Brown?

A. I knew him, yes, sir, but I didn't know any of the others.

Q. Did you ascertain from the defendants or from Henry Brown where they resided?

A. Yes, I did. When we booked them in at the jail I asked them where they lived and they said West Feliciana, four of them, and Henry Brown was from East Feliciana.

Q. Did you ascertain from them why they were over here that day?

A. I did, and they stated that they wanted to check out some books, different books. One of them stated that they were over here to integrate the Library, that was his purpose.

Q. Do you recall which one it was?

A. Yes, this one, the second one.

Q. Sheriff Doughty, can you identify the defendants by name?

A. Only Henry Brown. Let me correct myself, I could be mistaken, it might the second one from the end here, between these two over here.

Q. Had you ever seen any of them besides Henry Brown before?

A. I saw them when they came into Town that morning, they passed right along the street out there but I didn't know who they were, or who they were in Town with; I knew they were some I had never seen before.

Q. Did you ascertain whether or not they came over from [fol. 151] West Feliciana together?

A. Yes, sir, they did, and they didn't know who they came with, they caught a ride.

Q. Will Willie Kelly please stand?

A. (The witness did so.)

Q. Can you identify this man here as being one of the men in the library?

A. Yes, sir.

Q. You may sit down. Will L. C. Bibbins stand up please? Can you identify him as being one of the defendants arrested in the Library on the 7th of March?

A. Yes, sir.

Q. Robert Smith please stand up?

A. Robert Smith is one also.

Q. Cleveland McKinzie?

A. Yes, he is the other one.

By Mr. Kilbourne: I tender the witness.

Cross examination.

By Mr. Collins:

XQ. Sheriff, you said that at the time you saw these 5 colored males going into the Library you then decided to go over and see what was going on, is that correct?

A. When they entered the Library, I decided to go over. First, I called the jail to tell the Deputies that there were 5 colored males going into the Library. I had had some advance warning that something was going to take place there. Four of these boys were dressed in kind of macinaws, [fol. 152] dark clothes, kind of much the same, as they were coming down the street; Brown was dressed in a light-gray, three-quarter length coat.

XQ. Is there anything unusual about Negroes going into the Library in Clinton?

A. I had never noticed any going in there before.

XQ. To your knowledge has any Negro ever attempted to use the Library?

A. I wouldn't know, I think that was only the second time I had been there myself.

XQ. Sheriff, did you arrest these people, these defendants, because you considered their action going into the Library as a demonstration?

A. I arrested them because the occupants of the building had asked them to leave, and so had I; it was a public building and they refused to leave.

XQ. At the time you first walked into the building, Sheriff, what were these defendants doing?

A. All of them were standing around a table, all except Henry Brown, he was sitting at the table, or desk.

XQ. About how long was this after the time you first saw them go into the Library?

A. Approximately 10 minutes.

XQ. What did you tell them when you went in, Sheriff, did you have any conversations with these people?

A. Not with them, I talked to Mrs. Perkins, and she told me that she had taken their application and had asked them [fol. 153] to leave, and they wouldn't, and I asked them to leave. Henry Brown told me it as a public library, the rest of them didn't say anything.

XQ. Did Brown mention anything to you about wanting a book on the Constitution of the United States?

A. He did not.

XQ. After Brown told you that it was a public library, what did you say then?

A. I don't know of anything that I said. I was assured that Mrs. Perkins had asked them to leave since they didn't have the book they wanted.

XQ. Did you, at that point, ask them to leave?

A. I did.

XQ. When you—

A. —And I also told them that they had the choice of leaving, or be arrested for not leaving a public building when asked to do so by an officer.

XQ. When you got there, Sheriff, was anybody making any noise?

A. No noise.

XQ. So the disturbance of the peace if any in this case, consisted of refusing to leave when ordered to do so by you, is that right?

A. That's right.

By Mr. Collins: No further questions.

Re-direct examination

By Mr. Kilbourne:

Q. Sheriff Doughty, had these defendants left when you asked them to, or ordered them to, would you still have [fol. 154] arrested them?

A. No, sir.

Q. I believe that you already testified that when you got there Henry Brown was sitting down at a table, and the other 4 defendants were standing, is that right?

A. Yes, sir.

Q. Were they standing by him, or near him?

A. Right near him around the table, all in a group.

Q. Did anyone of them say anything to you about wanting to stay around there and read, or anything of that kind?

A. I don't believe that any of them said anything except Brown, at the time, until I asked him if that was their decision to stay—the same decision that he had made, to stay or be arrested, leave or be arrested. They said that they were going to stay with Brown.

Q. In your questioning of the defendants, did you ascertain if Henry Brown was the leader?

A. The impression that I got, since he was in front as he came down the sidewalk, and he went into the building first, he was the leader and they were following him.

Q. Whatever was said while the group was there, was he the one that was doing the talking?

A. Yes.

Q. Do you know Henry Brown?

A. I do.

Q. You see him sitting here, do you not?

A. I do.

By Mr. Kilbourne: That's all I have.

[fol. 155] Cross-examination

By Mr. Bell:

XQ. Sheriff, I think you stated that you only talked to Henry Brown while you were making these arrests, is that correct, sir?

A. I asked Mrs. Perkins if she had asked them to leave, and she said that she had, and then I asked them to leave, and Brown was the only one who spoke up at the time. Then I asked the others if that was their decision to stay also.

XQ. What did they say?

A. They said that it was, that they were going to stay with Brown. Up until then they hadn't had anything to say to me, I don't know what was said before I got there.

XQ. Prior to your asking these defendants to leave, did you ask each of them, all of them, whether or not they intended to use the reference-books at the Library?

A. I didn't ask them what they intended to do, and they didn't state at that time what they were doing there.

XQ. I think, as you know, Sheriff, under the Law in certain types of Disturbing the Peace situations, you have a right to ask people to move out of public or private places, as given to you by the Law; I think you stated that this was a public place?

A. A public Library, yes.

XQ. Did you ascertain whether or not they wanted to use this Library for reference reasons before you arrested them?

A. I gathered from the information that I had gotten [fol. 156] from Mrs. Perkins that she had taken the application for the book they wanted, and that it wasn't available, it wasn't there, she in turn asked them to leave.

XQ. Were you present when she asked them to leave, sir?

A. No, I was not.

XQ. But you did not ask them directly whether they intended to use the reference books?

A. No, I did not.

By Mr. Bell: That's all I have, thank you, Sheriff.

By Mr. Kilbourne: I believe that's all I have.

Witness Excused.

By the Court: It is now 11:45, and before we get on another witness, suppose we adjourn for lunch until 2:00 o'clock.

Court Adjourned at 11:45 A.M.

Court Convened at 2:00 P.M.

By Mr. Kilbourne: Your Honor, I would like to recall Mrs. Perkins to the stand.

By the Court: Mrs. Perkins you have been sworn and you remain under oath in this case.

[fol. 157] Mrs. MARSHALL PERKINS recalled:

Direct examination

By Mr. Kilbourne:

Q. Mrs. Perkins, how long have you been in library work?

A. About 20 years.

Q. How long have you worked at the Audubon Regional Library?

A. Since 1960.

Q. How long has the library you have worked with been in existence in the Parish of East Feliciana, in the Parish of West Feliciana, and in the Parish of St. Helena?

A. It's been—the library was opened in May of 1961 as a demonstration library.

Q. When did it become the Audubon Regional Library operated by the 3 Parishes?

A. Since last year, the first of May.

Q. Have you been connected with this library here since its inception, that is since 1961?

A. Yes, sir.

Q. Mrs. Perkins, during that time, have you in your work in this Library ever been confronted with the situation where 5 apparently grown men walked in and demanded service under the circumstances that these defendants demanded it? Or, have you ever been confronted with a situation in which 5 grown men walked in the Library and requested service?

A. I don't think so.

By Mr. Bell: Your Honor, I would like to object. I don't see any relevancy in the question whether 5 persons [fol. 158] had ever asked for service in a public library, and what has it to do with the guilt or innocence of this accused. The question is certainly immaterial and irrelevant, and for that reason I object to it.

By the Court: It might be relevant as far as it goes to the question of whether to vacate the premises.

By Mr. Kilbourne: For the benefit of the Court and of counsel, I will state that we are simply attempting to show that this is a very unusual situation calculated to create a disturbance.

By the Court: The Court will overrule the objection.

Q. What was your answer?

A. I don't think so.

Q. Mrs. Perkins, who was working in the Library on that particular morning?

A. The person who was on duty at the Branch was Mrs. Reeves and I.

Q. Do you have any male employees in the Library working?

A. Not in the Branch.

Q. For those who were present, did it create a disturbance, that what happened there that morning?

By Mr. Bell: I am going to object to that, Your Honor, [fol. 159] I think the whole purpose of this trial is whether or not they violated RS 14:103.1.

Q. I will withdraw the question, I will ask it this way, were you disturbed?

A. Yes.

By Mr. Kilbourne: I have no further questions. Just a minute, Your Honor, I have one more question.

Q. Do you know Willie Kelly by name?

A. By name, no.

Q. Willie Kelly, will you stand up?

A. (The witness did so.)

Q. Do you know him now? Do you recognize him as being one of the defendants?

A. As being one of the people there.

By Mr. Kilbourne: That's all I have.

Cross examination.

By Mr. Bell:

XQ. Mrs. Perkins, I think you testified in answer to the District Attorney's question as to whether or not you ever had 5 persons ask for service at the Regional Library, and I think you testified that you had not.

A. Not 5 at one time, and where only one person wanted the service.

XQ. You don't regularly attend the request for service at the 3 Branches, do you, Mrs. Perkins?

A. I am there and they usually ask me if there is some-[fol. 160] thing that they do not know.

XQ. I think Mrs. Reeves was in charge of service at this particular Branch at that time?

A. Yes.

XQ. You have 2 other Branches in other Parishes with which you are in charge?

A. Yes.

XQ. If 5 persons had presented themselves for service at some other time, you would not have known of it unless some unusual disturbance had been called to your attention?

A. That would probably be true unless I happened to be there at that Branch, which I am occasionally.

XQ. And you are in charge of all 3 Branches?

A. Yes.

XQ. Mrs. Perkins, you testified that you were in the headquarters' portion, you were in the back, I think, at the time these persons entered?

A. Yes.

XQ. And you merely came to the front when you were requested to do so by Mrs. Reeves?

A. Yes.

XQ. While you were in the rear portion of the building, you didn't hear any disturbance, did you?

A. I could hear voices back there, yes.

XQ. Were they loud and boisterous?

A. Not until I came out, of course they were talking.

XQ. Who was talking? I think you testified that no one [fol. 161] said anything, I think those are your words, "no one said anything." Who was talking loud?

A. Henry Brown when I came out.

XQ. Are you saying now that he talked loud enough to disturb you?

A. Yes.

XQ. I think the District Attorney asked you whether or not—which were you disturbed by the presence of the 5 persons, or were you disturbed by the loud talking of Henry Brown?

A. I simply couldn't understand, I mean, it isn't normal to loiter in the Library once you have been served. If you make no other request and want no other book, you usually get your book and go on your way.

XQ. I was trying to find out, Mrs. Perkins, whether or not you were disturbed by the presence of these 5 persons, or whether you were disturbed by what you call the loud talking by one of the accused named Henry Brown?

A. Well, I think it was a combination in that we had served him, and he asked for no further service.

XQ. Did you ask the other persons whether they requested service or not?

A. She told me that he had, and of course we had served him.

XQ. Mrs. Perkins, could you tell us approximately how many persons request the use of the various libraries during the course of a day?

A. We don't keep a record, I really don't know.

XQ. You couldn't estimate whether its 20, 25, or 50, or [fol. 162] 100, or something like that?

A. No, I couldn't, because you see I am not always out at the point of service.

XQ. And your records wouldn't show—

A. The records we keep are circulation records which show how many books were borrowed during the day, and it would also show how many reference questions we might answer; but there is no distinction as to whether this was telephone information, or not, we have no record of it.

XQ. Don't you keep records at the various libraries of who comes in to register, wouldn't that indicate to you the amount of business you are doing?

A. No, it would depend on the number of people who are already registered as well, and people may come to a library once, and never come back again.

XQ. Do you keep any registration-records at these libraries at all?

A. We keep registration-records at headquarters, yes, and they keep a weekly-record, and a monthly-record.

XQ. The headquarters are here in Clinton?

A. Yes.

XQ. Your records, then, would show who all is entitled to use the library?

A. Well, we do not have one general registration, in other words, we do not have a headquarters, a record of every person who is qualified to use the Library. You see, this is expensive and that is why we do not do it, we have [fol. 163] it by point of service, wherever a person is registered, that is where his registration-card is.

XQ. Is a person permitted to register at more than one of the libraries?

A. No, there is not any point in registering at more than one of the libraries.

XQ. Is a person permitted to use any particular—I mean, is he restricted to the use of the library where he is registered, or can he use any one of the Branches?

A. Well, yes, he could.

XQ. In connection with the Defense-#1, and #2, and #3, we note that you allowed one of the accused to have a book—

A. Certainly.

XQ. —without any, how can you charge him with the book unless you had a record of his registration?

A. I checked his registration-file from the Bookmobile, and I determined that he had a card, and furthermore the identification card was there, and that there were no fines against his name, and no lost books, so therefore we gave it to him.

XQ. And you did that from the registration-files at the—

A. At the Blue Bookmobile.

XQ. At the Blue Bookmobile?

A. That is correct.

XQ. On the matter of being disturbed, isn't it a fact that you were really disturbed because no Negroes usually patronized this particular Branch of the Library, they are more or less restricted to the Blue Bookmobile?

A. They normally use the Blue Bookmobile, yes.

[fol. 164] XQ. And isn't it a fact that all Negroes of the

3 Parishes are registered through the Blue Bookmobile, as far as your records show?

A. I believe so, yes.

XQ. And aren't your records designated for registration as to race?

By Mr. Kilbourne: If Your Honor please, I am going to object to this line of questioning, we are not trying an integration suit here today, we are trying a Disturbing the Peace charge.

A. No.

By Mr. Bell: Your Honor, I don't believe—

By the Court: The witness has answered the question.

By Mr. Kilbourne: I would like to object to the further pursuance of that line of questioning.

By Mr. Bell: That's all the questions I have, thank you, Mrs. Perkins.

Witness excused.

By Mr. Kilbourne: I would like to recall Sheriff Doughty.

[fol. 165] SHERIFF ARCH V. DOUGHTY recalled.

By the Court: Sheriff Doughty, you have been sworn and you remain under oath in this case.

Direct examination.

By Mr. Kilbourne:

Q. Sheriff Doughty, did you ascertain from the defendants that none of them was a juvenile?

A. None were juveniles, they were 17 and older.

Q. I believe that you have already testified that all but one was from West Feliciana Parish?

A. That's right.

Q. Sheriff, did you ascertain when and where the defendants got together before they came to Clinton to go to the Library?

A. I tried to find that out, but they gave conflicting stories on it, some said they caught rides, and it was hard to determine just where they did get together; some said downtown in St. Francisville, some said up here at the house, at the lodge-building up north of St. Francisville.

Q. Wherever they did get together, did you ascertain that they did get together for the purpose of coming to the Library?

By Mr. Bell: Objection, Your Honor, that goes to prove another line entirely, that's for conspiracy, and they are on trial for Disturbing the Peace, Your Honor, and not for the crime of conspiracy.

[fol. 166] By Mr. Kilbourne: Every crime involving more than two people also involves the crime of conspiracy, Your Honor.

By the Court: The Court overrules the objection.

By Mr. Bell: I would like to take an Exception to that, and ask that the question, the answer, and ruling of the Court all a part of the Bill of Exceptions.

Q. Will you answer the question, Sheriff?

A. That was the general idea, that they had gotten together and had come to Clinton to the Library.

Q. Sheriff, directing your attention to the defendant, Willie Kelly, do you recall whether or not he was specifically asked—whether he specifically said whether or not he wanted to get a book from the Library or not?

A. Willie Kelly was the one that was reading the little pamphlet that I had there, and he told me that they came to Clinton to sit-in at the Library.

Q. Willie Kelly told you that?

A. He did.

By Mr. Kilbourne: I tender the witness.

Cross examination.

By Mr. Bell:

[fol. 167] XQ. Sheriff, you know Mrs. Perkins and Mrs. Reeves, don't you?

A. Yes, sir.

XQ. Now, just for the record, they are members of the White race, are they not?

A. Right.

XQ. As yourself?

A. Right.

XQ. I think you testified that you were not called by Mrs. Perkins or Mrs. Reeves?

A. I was not called, I started over there, in fact I called the Deputies to go over there when I saw these 5 boys go in the Library; and it was probably 5 minutes between the time they got there that the Deputies and myself were there.

XQ. I think you testified previously that you had been alerted that a group of Negroes would try to go into the Audubon Reginal Library?

A. That something was going to take place at the Library, they didn't specify what; and when these 5 people, 4 of whom I didn't know go in the Library, I was interested in what was going on.

XQ. Your office is not too far from the Library, isn't that right, Sheriff?

A. That's right.

XQ. It's right here in the Court House?

A. That's right, or was at that time.

XQ. Did you note at any time any White persons enter- [fol. 168] ing and leaving the Library?

A. I saw one other person go in, I believe, after the defendants went in, and then the Deputies went in behind him.

XQ. As far as you know, that person was served without any incident, is that right?

A. I don't know if he went after a book or what, he just walked in behind them, and he was still there while we were there, and he was there when we left.

XQ. Did you see a young White lady go in?

A. I don't recall seeing anybody else go in at that time.

XQ. Was she already in the Library at that time?

A. Mrs. Perkins?

XQ. No, one of the White patrons?

A. I didn't notice anyone else going in. After the 5 defendants went in, the Deputies went in, and then I saw a White man go in.

XQ. Sheriff, you have been Sheriff for several years, have you not?

A. Since 1956.

XQ. And your office has always been in the same place, right across the street from the Audubon Regional Library?

A. In the southeast corner of the Court House.

XQ. And you have a private place of business located within view of the Audubon Regional Library, isn't that right?

A. That's right.

XQ. In your time, since you have been here and in your [fol. 169] place of business, have you ever seen any Negroes enter the Audubon Regional Library?

A. I don't recall seeing any go in, there is quite a bit of traffic in and out over there in those different buildings, but I don't recall seeing any go in and out there.

XQ. So, the fact that when 5 Negroes entered this Library, it was an unusual situation, isn't that right?

A. After having been alerted that something was going to take place over there at the Library, yes.

XQ. And as Sheriff of this Parish, you would be in a position to know that it has been customary for the Parish to maintain segregation of the races?

By Mr. Kilbourne: I object, Your Honor.

By the Court: I sustain the objection.

By Mr. Bell: To which ruling we except and ask that a Formal Bill of Exceptions be reserved, making the question and the answer, and the ruling of the Court all a part of the Formal Bill.

By the Court: In ruling, I think the question is not only irrelevant but misleading, and no one today can give me a definition of what segregation is. Look around this Court Room right here, and would you say we are segregated? [fol. 170] Ridiculous to say that we are segregated.

By Mr. Bell: No other questions, Sheriff.

Redirect examination.

By Mr. Kilbourne:

Q. Just one more question, Sheriff. In regard to your testimony about someone receiving information that something was going to happen at the Library, Sheriff, as a law-enforcement officer, did it occur to you immediately to keep the Library under surveillance when you got there?

A. It did, I kept an eye on the Library, and I posted all of the Deputies, I alerted them.

Q. Have you gotten warnings in the past prior to this incident that some kind of disturbance or demonstration was going to take place in the Community?

A. As well as I remember, each time there has been a picket-line or anything along that line, I have always been called by someone.

Q. Have you frequently received notice from the Federal Bureau of Investigation?

A. I have, they usually want to know if we need any assistance.

By Mr. Kilbourne: I have nothing further.

Witness excused.

By Mr. Kilbourne: Your Honor, the State rests.

MOTION FOR DIRECTED VERDICT AND COURT'S OVERRULING THEREOF

[fol. 171] By Mr. Bell: May it please the Court, at this time the defense would like to move for a directed verdict on several grounds, the first of which, of course, is that the State has failed to make a case against all of the defendants, and has not proven all of the elements of the crime as charged. I would like to respectfully call attention to the Court that the record will show that the basis of foundation of any criminal prosecution is proof of the jurisdiction of the case, or whether this Court has jurisdiction; and the State has failed to prove that a crime, if any, occurred in the Parish of East Feliciana in which it is being tried. I think the record will show that the State has offered no proof that this crime occurred in this particular Parish, and for that reason the defense moves for a Directed Verdict.

By the Court: Would the State like to be heard on it?

By Mr. Kilbourne: Of course, that takes me a little bit by surprise. I believe that we have proven that the offense [fol. 172] occurred right across the street from the Court House, right where we are sitting now; and I simply say this, I believe the Court will take cognizance of the fact that the Town of Clinton is in the Parish of East Feliciana, and the Library that we have been talking about all day is right directly across the street from the Court House, and I can't believe that counsel would urge that seriously, but that's all I have to say.

By Mr. Bell: Your Honor, I am aware—in fact I have it written here in my notes that it was brought out that the crime was located across from the Court House—that the crime was committed in the Library located across the street from the Court House, but I submit that that type of proof of jurisdiction is not—it's too vague and too ambiguous on which to base a conviction of 5 persons. If the Court would allow us time we could give you ample Briefs and proof that this type of proof as submitted by the District Attorney, as the proof of jurisdiction, which is the [fol. 173] basis of any criminal prosecution, it's time and time again been disallowed by our State Supreme Court.

By the Court: Didn't the Sheriff testify that this occurred across the street from the Sheriff's office, and that he was the Sheriff of East Feliciana Parish?

By Mr. Bell: That's right, but what I am saying, Your Honor, at no time was this crime alleged to have occurred, to use the word, "East Feliciana." I realize that that is a technical point, but I can assure Your Honor that this is a very serious urging of this point, and I think this is one of the things that you must prove in a criminal prosecution. The State must prove every element, every allegation of the Bill of Indictment, or Information. I think Mr. Kilbourne has alleged that this crime occurred in the

Parish of East Feliciana, and no proof has been offered that it has occurred. Across the street from the Court House by the District Attorney could mean two Parishes, [fol. 174] it could easily have been committed over in St. Francisville, which Your Honor is Judge over there too. I don't think the record would show on its face, as it stands now, this case is vulnerable for a Motion—

By the Court: Counsel, I can look out of the window and see—

By Mr. Bell: I submit all of that, Your Honor.

By the Court: —the Library, but of course, what you are saying is that: "Justice should be ever so blind?"

By Mr. Bell: All that I am saying, Your Honor, is that the procedure of this State, and the technicalities of criminal procedure requires that the record shows where the crime was committed without any hesitancy, without any guess.

By the Court: Do you think the District Attorney should take a tape measure and measure from the Court House to the place where the incident occurred, and then have another measurement to the Parish line to be able to prove it?

By Mr. Bell: No, sir, I am saying that he must use [fol. 175] East Feliciana as the Parish where the crime took place; he must prove, the record must show without any hesitancy, without any ambiguity that the crime was committed in this Parish. Now, I know, but I am not going to clear the record, what these words mean, and I am quite sure that everybody in this Court Room knows what they mean; but I say that the State must use the official name to give this Court proper jurisdiction on which to base a conviction in a criminal case.

Now, we can Brief this, and we are not trying to be hypothetical, but I think this is one of the basic rules of criminal procedure, that the situs of the crime should be made very, very plain; and I think if we should read the Bill of Information it says on there, "Parish of East Feliciana," that this crime was committed on a certain date.

By Mr. Kilbourne: If Your Honor please, Your Honor in this case would be in the same position a jury is. If [fol. 176] Your Honor is satisfied and knows where the crime is committed, that is all that the Law requires. I think that counsel could Brief this from now until Eternity and I am confident that he is not going to find any Law that is going to sustain what he is saying here today. I would like to have the Court rule on his Motion so we can get on with the case.

By the Court: The Court will overrule the Motion for a Directed Verdict.

By Mr. Bell: To which ruling, we respectfully except, and ask that the Motion, the argument, the objection of the District Attorney, and the ruling of the Court all be made a part of the Formal Bill of Exceptions.

By Mr. Collins: We would like to call for the defense, Mrs. Laura Spears.

[fol. 177] The Witness, Mrs. Laura Spears, after first having been duly sworn to tell the truth, the whole truth, and nothing but the truth, so help her God, testified as follows:

Direct examination.

By Mr. Collins:

Q. State your name, please?

A. Mrs. Laura M. Spears.

Q. What is your address, Mrs. Spears?

A. Box 384, Clinton, Louisiana.

Q. What is your occupation?

A. Unemployed housewife.

Q. What is your race?

A. Negro.

Q. What was your former occupation?

A. I was formerly employed by the Audubon Regional Library in Clinton.

Q. What did you do for the Audubon Regional Library?

A. I was Bookmobile 2 Assistant, I was in charge of the Blue Bookmobile. I was in charge of the service that served all Negro schools in the Communities throughout the 3 Parishes, East and West Feliciana, and St. Helena Parish.

Q. Do you know the defendants in this matter?

A. I know Henry Brown, he knows my parents, but I don't know him personally.

Q. Did you ever have occasion to register Henry Brown with reference to his borrowing books?

A. Yes.

[fol. 178] Q. Did you ever have any occasion to have any dealings with Henry Brown with reference to your duties as a Bookmobile librarian?

A. Yes, I served on the Bookmobile.

Q. What procedure is adopted in registering a person for books?

A. Well, we issued a card to a person who filled the required information out, and the card is stamped with the word, "Negro," and date.

Q. And then the person has the privilege of borrowing books, is that correct?

A. Yes.

Q. Do you ever register any white persons to borrow books?

A. No.

By Mr. Kilbourne: If Your Honor please, I want to object to that question, its irrelevant, immaterial.

By Mr. Collins: Your Honor, we think this question is very relevant to the very basis of this charge. We intend to prove by this question the segregated system with reference to library services in the Parish of not only East Feliciana, but throughout the region serviced by the Audubon Regional Library. I think we cannot do it except by this line of questioning.

[fol. 179] By the Court: The Court will overrule the objection.

Q. Have you ever registered any White persons?

A. No.

Q. Why is that that you haven't?

A. Well, the only persons who use the Blue Bookmobile is Negroes, and the Blue Bookmobile serves the 3 Parishes for all Negroes; and occasionally if a White person would come to the Blue Bookmobile, I would give them a schedule telling them when the Red Bookmobile would come, or the nearest Branch to them.

Q. Did Negroes customarily use the Branch Library located in the City of Clinton?

A. No.

Q. If they wanted books, how would they get their books?

By the Court: Counsel, I don't think there is any foundation laid for that question.

By Mr. Kilbourne: Your Honor, I never did understand your ruling on the last objection I made, I never was heard on it.

By the Court: I think we will just stop pursuing any more on this; I think we are trying a case here as to whether or not there was any disturbance that was unusual by these [fol. 180] patrons, the defendants.

By Mr. Collins: Your Honor, I think we are getting up to that question with reference to the presence of these persons in the Library, that's the very issue of the case.

By the Court: The witness has testified that she has been on a Bookmobile, she has said nothing about being in the Library; now she is testifying about what has taken place in the Library.

Q. How long were you employed by the Audubon Regional Library?

A. Two years and six months.

Q. When did you start your employment?

A. April 12, 1961.

Q. At this time you were then employed as a Bookmobile Librarian, is that correct?

A. Bookmobile 2 Assistant.

Q. How long did you continue in this capacity?

A. From December—pardon me, until December 31, 1963.

Q. In your capacity as a Bookmobile 2 Assistant, did you have occasion to frequent the Clinton Branch of the Audubon Regional library?

A. The Clinton Branch is headquarters for all of the Bookmobiles, and we would have to leave there every morning and come back in the afternoon.

[fol. 181] Q. So that you would be in a position to know whether or not Negroes used the facilities of the Clinton Branch of the Audubon Regional Library, is that correct?

A. Yes, I would know about when I was in, now I don't know about when I was out.

By Mr. Collins: I tender the witness.

Cross examination.

By Mr. Kilbourne:

XQ. As far as this particular case is concerned, you have no personal knowledge of it, whatsoever, do you?

A. No.

By Mr. Kilbourne: I have no further questions.
By Mr. Collins: The defense rests, Your Honor.
By Mr. Kilbourne: The State closes.

[fol. 182] COURT'S RULING

By the Court: This is a case, the State of Louisiana vs. Henry Brown, Willie Kelly, L. C. Bibbins, Robert Smith, and Cleveland McKinzie, in which they are charged with violation of R S 14:103.1 relative to Disturbing the Peace and with the intent of provoking a Breach of the Peace, and under the circumstances such that a Breach of the Peace might be occasioned thereby, they congregated together in the Audubon Library building in the Town of Clinton, Louisiana, and did then and there fail and refuse to leave such premises when ordered to do so by Mrs. Marshall Perkins who was then and there in lawful charge of said premises; and that further, the accused failed to leave said premises when ordered to do so by Arch V.

Doughty, the Sheriff of the Parish of East Feliciana.

There has been great effort to make these facts of this case much more difficult than it is, I guess better in keeping with the trends of these times.

The evidence clearly shows that these 5 men went into the [fol. 183] Library, that they asked for a book and were served, at least their order was taken. Of course, the Library at that time, being occupied only by two female library-workers, they then asked the parties to leave. This was done twice, and finally the Sheriff again asked them to leave.

Considering these facts and the further Law on the case which has been prescribed by the Legislature of this State, that is: A misdemeanor termed by anyone doing the following acts in a manner disturbing the public. Paragraph one includes the refusal to leave the premises when requested or directed to do so by the owner, lessee, or any employee.

Clearly the evidence shows that these parties did not congregate when they came to the Town of Clinton, to the Audubon Parish Library, merely for the purpose of seeking service; that they had a specific motive and a specific intent, and that was, as was shown beyond any reasonable doubt, to refuse to leave the Library even after they had [fol. 184] been served, and after they had been requested three times.

If the Court were to say that people who had been entrusted with the control of the property of this State, this Parish which belongs to all of us, were to be able to be flagrantly repudiated with a new system of contempt, and ridicule, certainly we would no longer exist then as a society of men and Law.

The Court will find the 5 defendants guilty as charged. The Law, counsel, allows 24 hours delay before sentencing unless you desire to waive same.

By Mr. Bell: May it please the Court, of course we are not going to except to the Court's ruling, but we would like to request an extension of time before sentencing so that we may obtain a complete transcript from the Court

Reporter in order to prepare any post trial motions that we care to entertain.

By the Court: How about May 26? Let the record show that an extension for sentencing is granted until May 26.

Court adjourned.

[fol. 185] Clerk's and Reporter's Certificates to foregoing transcript (omitted in printing).

[fol. 186]

SUPREME COURT OF THE UNITED STATES

No. 806—October Term, 1964

HENRY BROWN, et al., Petitioners,

v.

LOUISIANA.

ORDER ALLOWING CERTIORARI—May 3, 1965

The petition herein for a writ of certiorari to the Supreme Court of the State of Louisiana is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Washington Post
WASHINGTON, D. C.
D. 438,741 SUN. 536,647
B Rown v. Louisiana
FEB 24 1966

ice Black Blisters 5-to-4 Ruling

PAGE ONE

ouisiana Sit-In Conviction Reversed

John P. MacKenzie
inston Post Staff Writer

ajority of five Supreme
justices yesterday re-
a Louisiana sit-in con-
, provoking one of the
bitter and heated dis-
n recent memory from
Hugo L. Black.

Trembling with rage and shaking his finger at the courtroom audience, Black blistered the majority with a 30-minute verbal assault that made his strongly phrased written dissent seem pale by comparison.

Black charged that the Court, while claiming to vindicate the right to demonstrate against racial segregation in peaceful protest, ran the risk that "misguided" civil rights workers will think that they will be "automatically turned loose, so long as whatever they do has something to do with race."

ticizes Conduct

Calling on his reputation as a famed defender of free speech, Black denounced "psalm-singing" demonstrators for "conduct—not speech" that infringed the rights of others.

With apparent equal emotion but with firm, controlled delivery, Justice Abe Fortas announced the ruling of the Court and the fact that two justices had concurred for different reasons to make up the majority. Fortas rapped Louisiana officials for prosecuting the fourth breach-of-peace case the Court has had to review in four years.

The case arose in March, 1964, when five Negro CORE workers, after notifying the sheriff, entered the small, whites-only branch library in Clinton, La. The library was empty except for two librarians.

To the Negroes' surprise, the librarians looked for a book they requested but could not find it. The librarians then asked the Negroes to leave but they refused. The sheriff arrested the group 15 minutes later for disobeying his order to move on.

The Washington Post
JUSTICE BLACK
. . . bitter dissent

Fortas stressed that there was "no noise or boisterous talking." He said that Louisiana's law was so vague that the Negroes' conduct could no be brought within it, and if

See SIT-IN, A6, Col. 1

SI N—From Page A1

Black Angrily Ass Sit-In Case Reverse

could cover the quiet conduct it would be unconstitutional.

Concurring Justice William J. Brennan Jr. found the Negroes' conduct less dangerous than that of other demonstrators whose convictions had been reversed. Justice Byron R. White, who supplied the fifth vote, said he could not imagine white persons being

asked to leave unde
circumstances.

Chief Justice Ea
and Justice Willian
las joined in t
opinion.

Black was joined
by Justice Tom C.
M. Harlan and Pott

When Black had
half-hour deliver
White prepared to
another decision. "
very brief," he said.

Word to the Wise

For five years the Supreme Court has thrown out Southern convictions for nearly every kind of civil rights demonstration. So last week the court's reversal seemed inevitable in the case of Henry Brown and other CORE demonstrators, whose "stand-up" in a Clinton, La., public library resulted in their conviction for disturbing the peace.

Win the demonstrators did—but in a remarkably close 5 to 4 decision that apparently signaled the Supreme Court's growing disenchantment with ever bolder civil rights demonstrations. Though the Negroes were protesting an unconstitutionally segregated library system, the angriest of four dissenters in *Brown v. Louisiana* was none other than the court's most steadfast liberal, Justice Black, who declared, "It has become automatic for people to be turned loose as long as whatever they do has something to do with race. That is not the way I read the Constitution.

"The crowd moved by noble ideals today can become the mob ruled by hate and passion and greed and violence tomorrow," said Black. "If we ever doubted that, we know it now. The peaceful songs of love can become as stirring and provocative as the *Marseillaise* did in the days when a noble revolution gave way to rule by successive mobs until chaos set in . . . I am deeply troubled with the fear that powerful private groups throughout the nation will read the court's action as I do—that is, as granting them a license to invade the tranquillity and beauty of our libraries whenever they have quarrel with some state policy that may or may not exist. It is an unhappy circumstance, in my judgment, that the group which more than any other has needed a government of equal laws and equal justice, is now encouraged to believe that the best way for it to advance its cause, which is a worthy one, is by taking the law into its own hands." Warned Black: "It should be remembered that if one group can take over libraries for one cause, other groups will assert the right to do it for causes which, while wholly legal, may not be so appealing to this court."

CHICAGO
SUN-TIMES
D. 553,500 SUN. [illegible]0,500
Brown v. Louisiana
FEB 2 4 1966

Supreme Court Upholds Racial Protest In Public Library

By Tom Littlewood
Sun-Times Special

WASHINGTON — The U.S. Supreme Court reversed Wednesday the convictions of five Negroes arrested when they refused to leave a public library. Four justices expressed reservation, however, that civil rights demonstrators might be encouraged to go too far.

The court's 5-to-4 decision overturning the convictions thus extended the protective guarantees of free expression and assembly to protests in public buildings.

Justice Abe Fortas wrote the majority opinion, which was supported by Chief Justice Earl Warren and Justice William O. Douglas.

As he did last year in a case involving street and sidewalk demonstrations in Louisiana, civil libertarian Justice Hugo L. Black dissented strongly.

Moreover, two justices on the majority side indicated if the sheriff had not been so hasty about ordering the Negro demonstrators to leave, the arrest for breach of the peace would have been legal.

In Clinton, La., Negroes obtain books from a special bookmobile. When Henry Brown and four other members of the Congress for Racial Equality showed up at the regular white-only library, they were ordered out. They refused and were arrested, fined and sentenced to jail.

Fortas said CORE members were merely engaging in a peaceful protest demonstration against segregated facilities with no intent to provoke a breach of the peace.

Separate concurring opinions by Justices Byron R. White and William J. Brennan emphasized their agreement that the First Amendment did not forbid city regulations that limit "loafing" in library reading rooms.

Black saw a distinction between street demonstrations and those in libraries. He was backed in his dissent by Justices Tom C. Clark, John M. Harlan and Potter Stewart.

Black said he was "deeply troubled with the fear that powerful private groups will read the court's action as I do, granting them a license to invade the tranquillity and beauty of our libraries whenever they have quarrel with some state policy which may or may not exist.

"It is an unhappy circumstance, in my judgment, that the group, which more than any other has needed a government of equal laws and equal justice, is now encouraged to believe that the best way for it to advance its cause, which is a worthy one, is by taking the law into its own hands from place to place and from time to time."

Answered Fortas:

"It is an unhappy circumstance that the locus of these events was a public library—a place dedicated to quiet, to knowledge and to beauty. It is a sad commentary that this hallowed place bore the ugly stamp of racism.

"A state may, of course, regulate the use of its libraries or other public facilities. But it must do so in a reasonable and undiscriminatory manner. It may not provide certain facilities for whites and others for Negroes."

Brown v. Louisiana

Negroes' Sit-In Convictions Upset by Split High Court

By DANA BULLEN

Star Staff Writer

The Supreme Court today reversed the conviction of five Negroes who staged a sit-in at a Clinton, La., public library, but the justices split sharply on the legality of demonstrations in such places.

Although five justices voted for reversal, two of them did so for reasons different from those of three. Four justices dissented.

Justice Abe Fortas announced the judgment of the court in an opinion in which only Chief Justice Earl Warren and Justice William O. Douglas joined.

Justice Hugo L. Black was joined by three of the court's nine justices in a scathing dissent. Justices William J. Brennon Jr. and Byron L. White concurred in the outcome of the case, but for separate reasons.

The shape of the court's action—in which no opinion represented a clear majority of the justices—may indicate that the tribunal is unwilling to support some forms of civil rights demonstrations.

"Pretext" Charged

There has been growing fear among some of the justices that the court has been going too far in supporting the rights of demonstrators, and today's action perhaps means that a high water mark in this area already has been passed.

In his opinion for three justices, Fortas said that a state may not invoke its breach of the peace laws "as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights."

He said that Louisiana's breach of the peace law was used in this case solely to end a "reasonable" and "orderly" protest of unconstitutional segregation of a public facility.

"Interference with this right . . . by state action is intolerable under our Constitution," Fortas said. The library in the case was located in Louisiana's East Feliciana Parish.

Black, joined in a dissent by Justices Tom C. Clark, John Marshall Harlan and Potter Stewart, said states could forbid such demonstrations in public libraries.

Notes Property Rights

Noting his great regard for 1st Amendment rights, Black said, "But I have never thought and do not now think that the 1st Amendment can sustain the startling doctrine the prevailing opinion here creates,"

"The 1st Amendment, I think, protects speech, writings and expression of views in any manner in which they can be legitimately and validly communicated," Black said.

But, he asserted, "it (the 1st Amendment) does not guarantee to any persons the right to use someone else's property even that owned by government and dedicated to other purposes, as a stage to express dissident ideas."

Black said he feared "that powerful private groups throughout the nation will read the court's action, as I do . . . as granting them a license to invade the tranquillity and beauty of our libraries whenever they have quarrel with some state policy that may or may not exist."

Open to All

"It should be remembered that if one group can take over libraries for one cause; other groups will assert the right to do it for causes which, while wholely legal, may not be so appealing to this court," Black said.

"The states are thus paralyzed with reference to control of their libraries . . . and I suppose that inevitably the next step will be to paralyze the schools," Black said. "Efforts to this effect have already been made all over the country," he said.

Brennan, concurring in the court's judgment, but not in the Fortas opinion, supported reversal of the sit-in convictions on the ground that the breach of the peace statute involved was too broad in its language to support the convictions.

Conduct Not at Issue

In supporting reversal on this ground, Brennan said that "We need not decide whether petitioners' actual conduct is constitutionally protected."

White, who also concurred in the court's result but not in the Fortas opinion, said it "can hardly be said that the brief sojourn in this county library departed so far from the common practice of library users," so as to justify a breach of the peace conviction.

The five Negroes, whose convictions were reversed, had entered the Audubon Regional Library in Clinton in March 1964. One requested a book. Told it was not available, they all staged a sit-in on the premises.

The Negro who asked for the book was convicted of disturbing the peace and sentenced to pay a $150 fine or serve 90 days in jail. The other four, also convicted of disturbing the peace, were sentenced to paying $35 fines or 15 days in jail.

The library where the incident occurred was not open to Negroes, who could borrow books only from a blue-colored bookmobile. A red bookmobile also served white persons.

Black said in his dissent:

"I do not believe that any provision of the United States Constitution forbids any one of the 50 states of the Union, including Louisiana, to make it unlawful to stage 'sit-ins' or 'stand-ups' in public libraries for the purpose of advertising objections to the state's public policies.

"That, however, is precisely what the court or at least a majority of the court here holds that all states are forbidden to do by our Constitution. I dissent . . .

"Entirely Too Far"

"I have sometimes thought that this court has gone entirely too far in refusing to decide constitutional questions on the ground that they should be a avoided where possible. The journey here however goes entirely too far in this opposite direction . . .

"I say once more that the crowd moved by noble ideas today can become the mob ruled by hate and passion and greed and violence tomorrow."

Fortas said today was the fourth time in little more than four years that the Supreme Court has reviewed Louisiana convictions in civil rights cases under the state's breach of the peace statute.

In the earlier cases the court reversed convictions of lunch counter sit-ins, bus depot waiting room sit-ins and the leader of some 2,000 Negroes who demonstrated near a courthouse and jail to protest the arrest of fellow demonstrators.

Not Confined

Fortas said that the court "has repeatedly stated" that rights under the First Amendment guarantees of freedom of speech, assembly and petition "are not confined to verbal expression."

"They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities," Fortas said.

He said that there had been no disorder in the earlier cases decided by the court and in today's case "there was no disturbance of others, no disruption of library activities and no violation of any library regulations."

"A state or its instrumentality may, of course, regulate the use of its libraries or other public facilities," Black said. "But it must do so in a reasonable and not discriminatory manner, equally applicable to all and administered with equality to all."

31 March 1964

Collins, Douglas & Elie, Esqs.
2211 Dryades Street
New Orleans, Louisiana

Brown v. Davis etal.

Dear Bob, Nils and Lolis:

Thanks for the copy of the complaint. Lots of luck. Just this moment I received a copy of the denial of the order for a temporary restraint pending the hearing.

Do you think you should ask Judge Wisdom for a writ mandamous to West since the matter is so obvious.

Regards,

Carl Rachlin
General Counsel

CR:LP

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

TO: Robert F. Collins, Esq.
Nils R. Douglas, Esq.
Lolis E. Elie, Esq.
Murphy W. Bell, Esq.
Carl Rachlin, Esq.

Jack P. F. Gremillion, Esq.
Frank L. [illegible], Esq.
Thomas W. McFerrin, Esq.

NO. [illegible]

[illegible], ET AL.

VERSUS

[illegible], ET AL.

In accordance with Rule 77(d) of the Federal Rules of Civil Procedure, you are hereby notified that the Court (Judge West) has on April 20, 1964 rendered an ORDER THAT the defendants be granted an extension of TEN DAYS ONLY from date hereof within which to appear and plead to any pleadings in the complaint filed herein.

Very truly yours,
A. DALLAS WILLIAMS, JR., CLERK

By

11/24

BY HAND

November 9, 1964

Pierre A. Tonachel, Esq.
Uphan & Mecker
405 Lexington Avenue
New York, N.Y.

Re: Brown et al. v. Louisiana

Dear Pierre,

Thank you for agreeing to prepare the petition for certiorari in the above captioned case. Please bear in mind that December 3rd is the deadline for filing it in Washington.

Enclosed is the complete file, numbered 1 through 14, as well as Extract of Court Minutes and Deposition in Brown v. Davis, and covering letter to me from our counsel in New Orleans, Nils Douglas.

Regards,

Carl Rachlin
General Counsel

Enclosures/

P.S. Also enclosed are two forms of petitions for writ of cert. which might be useful to you. I would appreciate your returning them after you are finished with them.

CR:hdl

NOV 9 1964

Brown et al
v. La.
US Sup Ct.

We have

30 days

from November

4th to perfect

Cert. in U.S.

Sp Ct

& calculate

til Dec. 4th 1964 —

Nils

(1.)

NOV 9 1964

Dear Carl

Enclosed find entire record in Clinton - Library Integration - Dist Peace Convictions

1. I have numbered the documents for chronological and easy reading In total there are 14 documents as I have numbered them.

@ I have included just for general information and marked them as such the Federal Affirmative action regarding the same library.

(b.) I have included a copy of the deposition taken in the fedl. case at the instance of the State. Maybe we can incorporate the information. this document has not be introduced in any court yet.

(c.) I have submitted my only copies of many of these documents if lost it would be difficult to replace.

2. To get to the factual situation Read Stmt of Facts in rear of Document (10.)

3. You will note that there are 2 petitions for a Stay of execution To find out what happened in the state Sp Ct. read the allegations in Document (14.) ~~this petition~~ The order to this petition was not signed. When this one was filed the first Stay was reconsidered and signed

This is what happened in St. Sp. Court.

1. Certiorari denied Monday Oct 26
2. We received notice of denial Oct 27
3. Filed app. for Stay (first one) Oct 28
4. 2 of the defendants arrested Friday Oct 30th
5. Oct 31st Sat. we got word of arrests. Talked to Clerks to find out when action to be taken. Chief Justice could not be reached. Talked to Judge Hamlin St. Sp. Justice from Orleans Parish. He alone could not act. He called Judge Rardick — Rarick not home, ~~He~~ (Hamlin talked) to D.A. — D.A said Judge signed bench warrant only Judge could rescind.
6. Nov. 1st Sunday, Clerk called me. Said while in past St. Sp. Ct. granted Stay now, where cert denied technically the trial court had to grant Stay. Stay to Dist. Ct. prepared and sent on Bus.
7. Monday Nov 2, Judge Rarick denied Stay. He wrote on stay defendants right to appeal remains open or something to that effect.
8. Tuesday Nov. 3 election day courts closed Prepared 2nd petition for Stay including mandamus and habeas corpus (Dig those new const. grounds)
9. Wednesday Nov. 4th A.M filed 2nd Stay Wed. P.M. Yesterday First Stay signed (Given only 30 days to apply for cert)

10. Today Nov. 5th few minutes ago
received word Rarick said he
could not ~~ra~~ release defendants
(meanwhile a 3rd defendant was
arrested Henry Brown on Nov 4th)
Judy Rollins, presented papers —
She filed 1 copy in Clerks office
will present to Sheriff a 3 P.M.
Sheriffs office closed — funeral
will open a 3 today.

Quien Sabes??
thats the american
prostitution of the spanish
saying Who knows.

de Narre [illegible] / [illegible] petition for certiorari in La. v Brown [illegible] 3rd [illegible] [illegible] [illegible]

① Bill of Information [illegible] Watch

② Apply for bill of Pts   [illegible]

③ Bill of Parts

④ M to Squash

⑤ Transcript

⑥ ~~Aoy~~ Motion for a New Trial

⑦ ~~Bill~~ of Exception No. I

⑧ Notice of Application for Supervisory Writs

⑨ Per Curiam to Bill of Exceptions No: 1

⑩ — — — Prohibition ....

⑪ Decision of La. Sup Ct. denying the apply for writs

⑫ Pet for stay of exec.

⑬ " " " " "

⑭ " " " " "

(15) Also: Extract of Court Mins

and Deposition of Mr Kirby Reeves in Brown v. Davis

PS Also [illegible] 2 forms of petitions for writ [illegible] [illegible] [illegible]

COLLINS, DOUGLAS & ELIE
ATTORNEYS & COUNSELLORS AT LAW
201 DOUGLASS LIFE INSURANCE BUILDING
2211 DRYADES STREET
NEW ORLEANS 13, LOUISIANA

ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE

TELEPHONE
523-5197

November 21, 1964

COPY

Mr. V. J. Courville, Clerk
State Supreme Court
Civic Center
New Orleans, Louisiana

RE: State of Louisiana
vs
Henry Brown et al.
No. 47-496

Dear Mr. Courville:

We are seeking review by the United States Supreme Court of the above case. The rules of said court requires that a certified copy of the record be sent to them. Would you send certified copies of above record to the Clerk of the United States Supreme Court. It consists of, as I understand;

1. The original petition for certiorari,
2. The denial of the same,
3. The original application for a stay in the execution of the sentence,
4. The second application for stay in the execution of the sentence, and
5. An application for Habeas Corpus and Mandamus.

Respectfully,

COLLINS, DOUGLAS & ELIE

BY: ____________________________

NRD/amr

Dear Carl:

Please forward to Mr. Tonachel
I don't have his address

Nils

Jeannie make copy & send to Mr Tonachel

Memorandum from

Pierre A. Tonachel

Clinton library [illegible]

b/u 111

Nov 22

NOV 23 1964

Carl:

This is very fough -- but I'd be interestdd in having your comments as to general approach, etc.

Pierre

I'm also sending a copy to Nils Douglas.

P.

Sent to ~~Bert~~ L. Bert Ellis, for evaluation & editing

from Tonachel
Rec'd 12/1

COLLINS, DOUGLAS & ELIE
ATTORNEYS & COUNSELLORS AT LAW
201 DOUGLASS LIFE INSURANCE BUILDING
2211 DRYADES STREET
NEW ORLEANS 13, LOUISIANA

ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE

TELEPHONE
523-5197

November 27, 1964

COPY

Mrs. Erma Parden
5546 Winchester Street
Baton Rouge, Louisiana

Re: State of Louisiana vs. Henry Brown et al, B-4422

Dear Mrs. Parden:

We are applying to the United States Supreme Court for review of the above case. To do so we need a copy of the trial testimony certified to by yourself and by the Clerk of the Court in East Feliciana. We have until January 4, 1965 to lodge such record. Could you let me know by return post when we could expect to get a copy of said transcript and how much it would cost. Would you be going to Clinton between the time you have said copy prepared and the end of December ? If so, would it be possible for you to have Mrs. Durham certify the transcript.

Respectfully,

COLLINS, DOUGLAS & ELIE

BY:______________________

NRD/vmg

CC: Mr. Pierre Tonachel
Chrysler Bldg.
New York, New York

V. J. COURVILLE
CLERK

HAROLD A. MOISE, JR.
HUGH ST. PAUL
DEPUTY CLERKS

OFFICE OF THE CLERK
SUPREME COURT OF LOUISIANA
NEW ORLEANS, 12

TELEPHONES
523-4075
524-7798

November 25, 1964

mail to
Mr. Pierre
Torachel

Miss Inez M. Durham
Clerk of Court
20th Judicial District Court
Parish of East Feliciana
Clinton, Louisiana

Re: No. 47,496
State of Louisiana
v. Henry Brown et al

Dear Miss Durham:

Attached is a certified copy of an order dated today wherein the original stay of execution of the decree of this Court previously granted in the captioned case has been extended until January 4, 1965.

Please be governed accordingly.

With kind regards, I am

Cordially yours
Original Signed
V. J. COURVILLE
Clerk

VJC:N

cc: Richard H. Kilbourne, Esq.

Nils R. Douglas, Esq.

COPY

[illegible] #2[illegible]

REGISTERED MAIL - RETURN RECEIPT REQUESTED

December 31, 1964

Hon. John Davis, Clerk
United States Supreme Court
Washington, D. C.

Dear Sir: RE: Brown, et. al. v. Louisiana

I enclose herewith:

(a) Certified copy of the record in the above case.
(b) Transcript of Testimony in the above case in accordance with Louisiana practice.
(c) My check for $100.00 as docketing fee.

Under separate cover, also mailed today, are the requisite number of petitions for certiorari, together with certificate showing service upon the Attorney General of Louisiana and District Attorney Richard Kilbourne of Clinton, Louisiana. Please docket the same.

Thank you for your courtesy.

Very truly yours,

CR/bs
Enc.

CARL RACHLIN

cc: Hon. Harold A. Moise, Jr.
Deputy Clerk
Supreme Court of Louisiana
New Orleans, La.

bcc: Collins, Douglas & Elie
2211 Dryades St., New Orleans, La. 70113

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

January 4, 1965

JAN 5 - REC'D

Carl Rachlin, Esq.
165 West 46th Street
New York, N. Y. 10036

RE: BROWN, ET AL. v. LOUISIANA
No. 806, October Term, 1964

Dear Mr. Rachlin:

I received your letter of December 31, 1964, together with the documents referred to therein, in connection with the above-entitled case. This case was docketed January 4, 1965, as No. 806, October Term, 1964.

Kindly complete both sides of the enclosed form for the entry of your appearance and return it to this office.

Also enclosed are forms for notifying opposing counsel that the case was docketed. No proof of service of this notification is necessary.

Very truly yours,

JOHN F. DAVIS, Clerk

By Edward C. Schade
E. C. Schade
Assistant

jmh
Enclosures

Hold for 1 more wk

February 9, 1965

Hon. Richard Kilbourne
District Attorney
Clinton, Louisiana

I have not received your response to the petition for certiorari in Brown, et. al v. Louisiana, U.S. Supreme Court Docket No. 806, October Term, 1964.

Has this gone astray, or, if not, do you intend to submit a response?

Thank you for your advice on this.

Yours very truly,

Carl Rachlin
CORE General Counsel

CR:jp

cc: Hon. John Davis, Clerk
United States Supreme Court
Washington, D. C.

Hon. Jack Gremilion
The Attorney General
New Orleans, Louisiana

Collins, Douglas & Elie
2211 Dryades Street
New Orleans, Louisiana

DISTRICT ATTORNEY
TWENTIETH JUDICIAL DISTRICT
OF LOUISIANA

RICHARD KILBOURNE
DISTRICT ATTORNEY
CLINTON

PARISHES OF EAST AND WEST
FELICIANA

FEB 19 1965

February 18, 1965

VIA AIR MAIL

Mr. Carl Rachlin
General Counsel
Congress of Racial Equality
36 Park Row,
New York, N. Y.

Re: State of Louisiana v. Brown
et al.

Dear Mr. Rachlin:

Reference is made to your inquiry of February 9th.

I do not intend to submit a response to your application to the United States Supreme Court for review of this case.

Yours very truly,

Richard Kilbourne

District Attorney
20th Judicial District of Louisiana

February 24, 1965

Mr. John F. Davis
Chief Clerk, U.S. Supreme Court
Washington, D.C.

re: **Brown et al vs. State of Louisiana**
#806

Dear Sir:

I enclose a copy of letter dated February 18, 1965 from the Hon. Richard Kilbourne, District Attorney, Twentieth Judicial District of Louisiana, which sets forth that he does not intend to reply to the petition for a writ of certiorari in the above styled case.

Yours very truly,

Carl Rachlin
General Counsel

CR:jp
Encl.

cc: Hon. Jack Gremillion
Attorney General, State of Louisiana
New Orleans, Louisiana

Hon. Richard Kilbourne
District Attorney
Twentieth Judicial District of Louisiana
Clinton, Louisiana

Collins, Douglas and Elie, Esqs.
2211 Dryades Street
New Orleans, Louisiana

file

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

MAR 1 1965

February 26, 1965

Carl Rachlin, Esq.
38 Park Row
New York 38, N. Y.

RE: BROWN, ET AL. v. LOUISIANA
No. 806, October Term, 1964

Dear Mr. Rachlin:

I have your letter of February 24, enclosing a carbon copy of a letter from opposing counsel stating that he will not file a response to the petition in the above-entitled case.

Very truly yours,

JOHN F. DAVIS, Clerk

By

E. P. Cullinan
Chief Deputy

EPC:jmh

COPY

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

MAR REC'D

March 8, 1965

The Honorable Jack P. F. Gremillion
Attorney General of Louisiana
Baton Rouge, Louisiana

RE: BROWN, ET AL. v. LOUISIANA
No. 806, October Term, 1964

Dear Sir:

A petition for a writ of certiorari was filed in this Court on January 4, 1965, in the above-entitled case, and my records indicate that you were served on or about that date.

I have been directed by the Court to request that you file a response to that petition, and forty printed copies of your response, with service, should reach this office on or before April 7, 1965.

Very truly yours,

JOHN F. DAVIS, Clerk

By

E. P. Cullinan
Chief Deputy

EPC:jmh

AIR MAIL

cc: √Carl Rachlin, Esq.
165 West 46th Street
New York, N. Y. 10036

State of Louisiana
DEPARTMENT OF JUSTICE
Baton Rouge

JACK P. F. GREMILLION
ATTORNEY GENERAL

April 1, 1965

APR 3 1965
APR 5 1965

Mr. Carl Rachlin
Attorney at Law
38 Park Row
New York, New York

Re: Henry Brown, et al vs.
State of Louisiana, No. 806

Dear Mr. Rachlin:

You will find enclosed two copies of the Response of the State of Louisiana in the above entitled matter which has this day been mailed to the Clerk of the United States Supreme Court for filing.

Yours very truly,

Harry J. Kron, Jr.
HARRY J. KRON, JR.
Assistant Attorney General

HJKJr/jh

enclosures

send a copy of brief to

~~David Freeman of Rockefeller~~

THE FOLLOWING PAGES ARE THE BEST AVAILABLE.

Race Relations Law Reporter
VANDERBILT UNIVERSITY
NASHVILLE 5, TENNESSEE

June 21, 1965

JUN 23 1965

Carl Rachlin, Esq.
General Counsel
Congress of Racial Equality
38 Park Row
New York 38, New York

Dear Mr. Rachlin:

Mr. Nils Douglas has referred me to your office as a possible source of information relative to the case of State of Louisiana v. Henry Brown, et al.

I am attempting to ascertain if there was any judgement or opinion entered in the lower state courts. I am aware that there was no written opinion by the Louisiana Supreme Court. If your files on this case reflect such a lower court opinion or judgment, we would appreciate very much receiving a copy, and we would be glad to reimburse your staff for any cost in copying the material.

Thank you for any assistance you can give me in this matter.

Sincerely,

Ann Ingram

Mrs. Ann Ingram
Assistant to the Director

June 28, 1965

Mrs. Ann Ingram
Assistant to the Director
Race Relations Law Reporter
Vanderbilt University
Nashville 5, Tennessee

Dear Mrs. Ingram:

We are very happy to be able to assist you in the production of your excellent and extremely helpful Reporter.

Enclosed please find a copy of the transcript of Oral Opinion and Judgment of the District Court as we reproduced it in the appendix of our petition for writ of certiorari.

Please let us know any time we can be of further service to you.

Sincerely,

CARL RACHLIN
General Counsel

by Michael Kupersmith
Legal Assistant

MK/cs
Enc.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

June 29, 1965

JUL 1 1965

Carl Rachlin, Esquire
38 Park Row
New York, N. Y., 10038

RE: BROWN, ET AL. v. LOUISIANA
No. 41, October Term, 1965

Dear Mr. Rachlin:

In preparing the record for the printer in the above-entitled case, I believe that while the 127 page transcript technically is not part of the record that it probably should be printed in view of the fact that both parties referred to it in the petition for certiorari and brief in opposition.

Unless I hear from you to the contrary, I intend printing it following the 55 page record in the Supreme Court of Louisiana.

Very truly yours,

JOHN F. DAVIS, Clerk

By

E. P. Cullinan
Chief Deputy

EPC:rlf

cc: Honorable Jack P. F. Gremillion
Attorney General of Louisiana
Baton Rouge, Louisiana

RUTGERS · THE STATE UNIVERSITY

SCHOOL OF LAW

53 WASHINGTON STREET
NEWARK, NEW JERSEY 07102

JUL 8 1965

July 6, 1965

Carl Rachlin, Esq.
38 Park Row
New York, N.Y.

Dear Mr. Rachlin:

The Moot Court Board is very much interested in the case of Brown v. Louisana, which has recently been granted certiorari by the United States Supreme Court.

It is our hope that, with your assistance, we will be able to use this case in our Appellate Moot Court program during the forthcoming semester.

The Law School and particularly this Board would be deeply grateful to you if you could send us a copy of the appendix along with a copy of your brief on this case.

We would also appreciate the name and adress of opposing counsel.

Thank you very much.

Very truly yours,

MOOT COURT BOARD

By: George Y. Sodowick
George Y. Sodowick,
Chairman

July 8, 1965

Hon. John F. Davis, Clerk
United States Supreme Court
Washington, D. C. 20543

RE: Brown, et. al. v. Louisiana
No. 41, October Term, 1965

Dear Sir:

I have your letter of June 29. I have been out of town until this morning. I am concerned about the additional cost of printing such a record as you discussed in your letter of June 29. If the cost is substantial, would it be satisfactory if we made photocopies of this record?

Thank you for your courtesy.

Sincerely,

CARL RACHLIN
General Counsel

CR/cs

cc: Honorable Jack P. F. Gremillion
Attorney General of Louisiana
Baton Rouge, Louisiana

August 23, 1965

Mr. Marvin Rich
CORE SEDF
150 Nassau Street
New York, New York 10038

RE: Brown, et. al.
v. Louisiana

Dear Marvin:

Yesterday we filed our briefs in the above entitled case. I enclose a supplementary small bill from the Clerk of the United States Supreme Court.

Please be advised that in the West Feliciana school board case where we have received a poor order of desegregation from the federal judge, at my instructions three weeks ago we appealed the order even thought we had basically won the case and yesterday we did receive word that the Fifth Circuit upheld our point of view and has directed the district court to issue a stronger order.

Sincerely,

CARL RACHLIN
General Counsel

CR/cs
Enc.

August 27, 1965

Murphy W. Bell, Esq.
971 S. 13th Street
Baton Rouge, Louisiana

Dear Murphy:

Enclosed is a copy of the brief for Brown v. Louisiana . I hope it will be possible for you to come to Washington at the time of the argument and help me prepare at that time. At this time, however, we do not know the date of the argument, but I assume you and I will receive notices at the same time.

With best regards,

Sincerely,

CARL RACHLIN
General Counsel

CR/cs

TELEPHONE
348-3572

MURPHY W. BELL
ATTORNEY AT LAW
971 SOUTH 13TH STREET
BATON ROUGE, LA.

November 1, 1965

Carl Racklin, Esq.
38 Park Row
New York, New York 10038

Dear Carl:

I received your letter of notice from John F. Davis, Clerk of Supreme Court.

I am presently getting my application paper in order for admission to the U.S. Supreme Court.

I have been reviewing the file in this case along with the petition for cert.

I was unaware that the trascript was not part of the Supreme Court record. How did this happen? In view of this fact, I would like to be present and for you to move my admittance. I think, however, that you should present the oral argument, because of your superior experience, inter alia.

Is this satisfactory?

Very truly yours,
Murphy W. Bell
Murphy W. Bell

MWB/ps

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
1111 EAST 60TH STREET
CHICAGO · ILLINOIS 60637

send copy of brief

December 28, 1965

RECEIVED
DEC 30 1965
VLADECK, ELIAS, FRANKLE & VLADECK

Carl Rachlin, Esq.
165 W. 46th Street
New York, N.Y.

Dear Mr. Rachlin:

This January, as for the past ten years, this Law School has given a seminar dealing with the current business of the United States Supreme Court. With the generous assistance of counsel, we have used briefs in pending cases as our basic material. Will you send us your brief in No. 41, Brown v. Louisiana? ~~We shall return it if you wish~~.

Thanks very much for your consideration.

Sincerely,

David P. Currie /mwk
David P. Currie
Associate Professor of Law

DPC:mwk

sent 2/8/66

Brown v La

FEB 28 1966

CHARLES BALLON

February 25, 1966

Dear Carl:

Congratulations on your important victory in the Louisiana Library case!

It is very difficult to believe that late in the 20th century it takes a U. S. Supreme Court decision to permit a negro peacefully to take out a book from a Louisiana library; that library cards are stamped "Negro," which restricts such holders to obtaining books from a bookmobile, and that an entirely undemonstrative stand-in by five negroes protesting the refusal of the lily-white library to issue a book to a negro was a lawful protest.

I confess that my joy in reading Fortas' opinion and the fact that you represented Brown et al turned to dismay and then shock when I read the dissent, its reductio ad absurdum reasoning, and most disappointing perhaps of all that it was written by Black.

You have made another significant contribution to this body of law and we are all proud of you.

Best regards,

Charley

Carl Rachlin, Esq.
165 West 46th Street
New York, N. Y.

CB:ab

WESTERN UNION

W. P. MARSHALL
CHAIRMAN OF THE BOARD

TELEGRAM

The filing time shown in the date line on domestic telegrams is LOCAL TIME at point of origin. Time of receipt is LOCAL TIME

VNA925 NBA151 (19)CTG091
NJ058 VV MFA045 COLLECT NF WASHINGTON DC 25 1057 EST
CARL RACHLIN
58 PARK ROW NYK
JUDGMENT HENRY BROWN AGAINST LOUISIANA REVERSED TODAY, CASE REMANDED, ADVISE ASSOCIATES
JOHN F DAVIS CLERK
(10).

[illegible](R8-65)

March 3, 1966

Pierre Tonachel, Esq.
Uphan & Meeker
405 Lexington Avenue
New York, New York

Dear Pierre:

Now that we have gotton the decision in *Brown* v. *Louisiana* may I thank you for the tremendous amount of work you did in making this victory possible. The case appears to be a land mark case and one that will have to be watched carefully by civil libertarians and civil rights volunteers to make certain that we do not turn our 5-4 majority into a 5-4 defeat in the future.

With best regards,

Sincerely,

CARL RACHLIN
General Counsel

CR/cs

March 9, 1966

Charles Ballon, esq.
1501 Broadway
New York, New York

Dear Charlie:

Thank you very kindly for your note of the 25th concerning Brown v. Louisiana. Of course we were pleased to win the case but, I must say that all the attorneys that handle civil liberties and civil rights cases had better concern themselves with the fact that the court may be assuming a new face. A line seems to be in the process of being drawn between two different conceptions - speech and action. I think this line is being drawn sharply and may already have more than four judges in support of it. Why Justice Black has gone in this direction is not altogether clear but I feel one of the answers may lie in the fact that hehas always taken an absolute position on the First Amendment. As a result when ever he did not like a particular case he drew a line between speech and action so as to interfere with his defense of speech and this has now become generalized into a rule and speech becomes narrower and narrower. He has taken this so far at the present time that a refusal to obey a police order falls under the heading of action and he does not stop to analyze the matter of the police order.

By the way I am writing a Law Review article which I hope to have finished by the end of the month.

With best regards.

Sincerely,

CR:tp

Carl Rachlin
General Counsel

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

MAR 2 3 1966

March 21, 1966

Carl Rachlin, Esquire
38 Park Row
New York, New York 10038

RE: Brown et al. v. Louisiana, No. 41, Oct. Term, 1965

Dear Mr. Rachlin:

The mandate of this Court in the above-entitled case has been mailed today to the Clerk of the Supreme Court of Louisiana.

Your clients are given recovery for costs in this Court as follows:

Clerk's costs	$	265.92
Printing of record		635.75
Total	$	901.67

This amount may be collected through the Supreme Court of Louisiana or direct from opposing counsel or parties.

Enclosed is a receipted statement to cover the deposit heretofore made in this case.

Very truly yours,

JOHN F. DAVIS, Clerk

By Evelyn R Limstrong

(Mrs) Evelyn R. Limstrong
Assistant

Encl.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

STATEMENT OF COSTS

No. 41 October Term, 1965

Brown, et al.,
Petitioners,

vs.

Louisiana

TOTAL DEPOSITS	$ 901.67
CLERK'S COSTS	
Docket fees	$ 150.00
Supervising printing of record	115.92
Handling charge	0.00
Total	$ 265.92
Cost of printing record	635.75
	$ 901.67
Refund by check	0.00
	$ 901.67

JOHN F. DAVIS, Clerk
By Edward Faircloth

March 25, 1966

Honorable Jack P. F. Gremillion
Attorney General of Louisiana
Baton Rouge, Louisiana

My dear Mr. Gremillion:

Enclosed is a copy of a letter to me from the Clerk of the U. S. Supreme Court indicating that we are entitled to $901.67 as for cost in BROWN v. LOUISIANA. I also enclose a copy of the detailed statement as to how this figure was computed.

I would appreciate hearing from you as to how you will handle this matter. Thank you for your consideration.

Very truly yours,

Carl Rachlin
General Counsel

CR:tp
Ecnl:
cc: Murphy Bell, Esq.
Collins, Douglas, & Elie, Esqs.

March 28, 1966

Mr. Allen Koritzinsky
522 State Street
Madison, Wisconsin

Dear Al:

I want to take this opportunity to thank you for all the help you gave in BROWN v. LOUISIANA. However, it bodes not too well for the future in light of Judge Black's dissent.

By the way it is my plan to be in Madison for the evening performance of Hamlet on May 2nd. It would be great fun for me and possibly even useful to some of the students if you could set up a meeting for late that afternoon with students interested in civil rights and civil liberties at the law school. Let me hear from you as to whether you think this can be done.

Cordially,

CR:tp

Carl Rachlin
General Counsel

DISTRICT ATTORNEY
TWENTIETH JUDICIAL DISTRICT
OF LOUISIANA

RICHARD KILBOURNE
DISTRICT ATTORNEY
CLINTON

PARISHES OF EAST AND WEST
FELICIANA

April 6, 1966

Mr. Carl Rachlin
General Counsel
Core Scholarship Education
and Defense Fund, Inc.
150 Nassau Street
New York N. Y. 70038

Dear Mr. Rachlin:

Reference is made to your letter of March 25 regarding the refund of costs paid the United States Supreme Court in Brown v. Louisiana.

The cost, amounting to $901.67, will be paid by the Police Jury of East Feliciana Parish. Kindly advise me how the voucher should be made.

Yours very truly,

District Attorney

cc: Honorable Jack P. F. Gremillion
Attorney General of Louisiana

April 11, 1966

Richard Kilbourne, District Attorney
Clinton, Louisiana 70722

Re: Brown v. Louisiana

Dear Mr. Kilbourne:

Thank you very much for your letter of April 6th. The voucher in the sum of $901.67 should be made out to the Scholarship, Education & Defense Fund, Inc.

Cordially,

CARL RACHLIN,
General Counsel

CR:gm
cc: Honorable Jack P. F. Gremillion,
Attorney General of Louisiana

APR 13 1966

Photocopy
Brown v.

8C Hayden
33 Washington Square West
New York, N.Y. 10011
12 April, 1966

Mr. Carl Rachlin, Esq.
Attorney at Law
165 W. 46th St.
New York, N.Y.

Dear Mr. Rachlin:

As the term project for a graduate-level course in Civil Rights at New York University Law School, I am undertaking a thorough study of the Supreme Court's decision in Brown v. Louisiana, 86 S.Ct. 719, which was decided on February 23, 1966, and for which you argued the petitioner's side. It would greatly facilitate my study if I could obtain a copy of the brief you filed in the case, as well as copies of any supporting materials which are available. I should be most happy to reimburse you for any expense involved in furnishing the requested materials, and of course I should be glad to return them when I have finished my research--hopefully within a month.

I shall be grateful for your assistance in this matter, and anxiously await your reply.

Sincerely yours,

Michael Henke

Michael Henke

April 19, 1966

Mr. James A. Cook
1731 New Hampshire Ave.,N.W.
Washington, D. C.

Dear Mr. Cook:

With regard to Brown v. Louisiana, as you know Clinton is a very segregated town in one of the most segregated areas in the United States. In fact, what I consider the most significant aspect of the entire case concerns the fact that after this incident occurred, the library was closed and has been closed ever since. In other words, all the people in the community have been made to suffer because they want to maintain the idiotic privilege of refusing to let young Negroes use their library.

With regard to Judge Black's dissent, I have written a long law review article for the Santa Clara Lawyer which will be available fairly soon. You might take a look at it.

Sincerely,

CR:tp

Carl Rachlin
General Counsel

JUL 5 1966

COLLINS, DOUGLAS & ELIE
ATTORNEYS & COUNSELLORS AT LAW
201 DOUGLASS LIFE INSURANCE BUILDING
2211 DRYADES STREET
NEW ORLEANS, LOUISIANA 70113

ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE

TELEPHONE
523-5197

6/30/66

COPY

Re Louisiana v Henry Brown

Carl Rachlin,

I am trying to put LCDC's house in order. We can't find this file & by the copy to Jackson asks if it's there.

We assume you got the $\$90^{67}$ costs & won't follow up unless you say you did not get it.

I hope you pass through NO in the next few weeks.

Sincerely

cc: AB
HS

SCHOLARSHIP,
EDUCATION
AND DEFENSE
■ FUND FOR
RACIAL EQUALITY
inc.
150 NASSAU STREET, NEW YORK, N.Y. 10038
TELEPHONE 964-8210

July 6, 1966

Jerry Gutman, Esq.
Collins, Douglas & Elie, Esqs.
2211 Dryades Street
New Orleans, Louisiana

LCDC La file #304

Dear Jerry:

I was so glad to hear from you. Iam sending Lolis Elie a letter today indicating that I expect to be in New Orleans the last week in July and accordingly I look forward to seeing you.

The $901.67 in Brown V. Louisiana was sent to us and I delivered the same to S.E.D.F. which had paid all costs of the case. If there are any particular papers you want in that matter, let me know and I will make duplicates for you.

Best regards,

Carl

Carl Rachlin
General Counsel

CR/tp

7/7/66

Thanks Carl —
Don't need a thing — just wanted
to be sure SEDF got its bread (or pound
of flesh). See you soon.

Contributions are deductible for income tax purposes

[illegible]; Andrew E. Norman ■ vice presidents; William S. Ellis, Nannette Sachs ■ secretary; Ezra Levin ■ treasurer; Shelley Appleton ■ executive director; Marvin Rich ■ leadership development director; Ronnie M. Moore ■ legal director; Carl Rachlin ■ BOARD OF DIRECTORS; John P. [illegible] ■ James Baldwin ■ Katrina McCormick Barnes ■ Canon James P. Breeden ■ Dr. Kenneth B. Clark ■ Robert Curvin ■ Charlotte Devree ■ [illegible] F. Dugan, S.J. ■ John Henry Faulk ■ Doris Freedman ■ Dr. Edward L. Gibson ■ Norman Hill ■ Clarence B. Jones ■ Joann List Levinson ■ Henry [illegible], III ■ Dr. William Stuart Nelson ■ Elaine Slater ■ Norman Thomas ■ Rowland Watts ■ Pearl L. Willen

Chicago Defender

D. 33,073

FEB 24 1966

PAGE ONE

Brown v Louisiana

Supreme Court Reverses 'Sit-In' Convictions

See Page 3

High Court Reverses 'Sit-In' Convictions

By CHARLOTTE C. MOULTON

WASHINGTON — (UPI) — The Supreme Court Wednesday reversed the convictions of five Negro sit-in demonstrators in Louisiana. Dissenting justices warned the decision might encourage Negroes to take the law into their own hands.

The vote was 5 to 4 to upset convictions of five members of the Congress of Racial Equality (CORE) who staged a sit-in at a Clinton, La., library in March, 1964, and were arrested and fined on charges of breach of the peace.

Justice Abe Fortas wrote the prevailing opinion for the majority, which split three ways in the case. He was backed by Chief Justice Earl Warren and Justice William O. Douglas.

Fortas held that the five demonstrators had not violated the Louisiana breach of the peace law. But if their conduct had been deemed a violation, he said, the law would be unconstitutional as applied in the Clinton case.

The demonstrators were protesting a system governing use of the library operated by three parishes or counties. Negroes with cards stamped "Negro" were permitted to borrow books only from a bookmobile and were prohibited even from browsing in the library itself.

Fortas held that "a state or its instrumentality may of course regulate the use of its libraries or other public facilities. But it must do so in a reasonable and non-discriminatory manner, equally applicable to all and administered with equality to all."

Justice Hugo L. Black, writing for the four dissenters, said he, too, lamented the circumstances but expressed fear that "powerful private groups throughout the nation" would find a broader interpretation in Wednesday's ruling.

"It is an unhappy circumstance in my judgment that the group, which more than any other has needed a government of equal laws and equal justice, is now encouraged to believe that the best way for it to advance its cause, which is a worthy one, is by taking the law into its own hands from place to place and from time to time," Black wrote.

Brown

DAILY NEWS
NEW YORK'S PICTURE NEWSPAPER
D. 2,170,273 SUN. 3,102,285

FEB 24 1966

5 Sit-Ins Win In Reversal by Highest Court

Washington, Feb. 23 (UPI)— The Supreme Court reversed today, 5-4, convictions of five Negro sit-in demonstrators in Louisiana. Dissenting justices warned that the decision might encourage Negroes to take the law into their own hands.

The demonstrators were members of the Congress of Racial Equality who staged a sit-in at a Clinton, La., library in March, 1964. They were fined on charges of breach of the peace.

Justice Abe Fortas wrote the majority opinion, which held that the five had not violated the Louisiana breach of peace law.

Justice Hugo L. Black, writing for the dissenters, said he, too, lamented the circumstances but expressed fear that "powerful private groups throughout the nation" would [illegible]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 41

HENRY BROWN, WILLIE KELLY, L. C. BIBBINS, ROBERT SMITH and CLEVELAND McKINZIE,
Petitioners,

vs.

STATE OF LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI TO SUPREME COURT OF LOUISIANA →

BRIEF [illegible] & FOR PETITIONERS

~~PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA~~

~~Petitioners pray that a writ of certiorari issue to review the decree of the Supreme Court of Louisiana entered in the above-mentioned case on October 26, 1964 which denied petitioners' Application for Writs of Mandamus, Certiorari and Prohibition, thus affirming the conviction rendered by the Twentieth Judicial District Court of East Feliciana Parish, Louisiana (herein called the District Court), on April 9, 1964. A stay of execution of petitioners' sentences for a period of thirty days was granted by the Supreme Court of Louisiana on November 4, 1964, and was subsequently extended for an additional period of thirty days expiring on January 4, 1965.~~

~~Civil Rights Act of 1964, Public Law 88-352, 88th Cong., H.R. 7152, July 2, 1964, 78 Stat. 241, et seq.~~

A petition for certiorari was filed in this Court on January 4, 1965. Certiorari was granted on May 3, 1965.

Opinions Below

The District Court found petitioners guilty, without written opinion. The memorandum opinion of the Supreme Court of Louisiana is unreported and appears in ~~Appendix A hereto, *infra*, p. 1a.~~
Record, p. 139.

Jurisdiction

The convictions were rendered by the District Court on April 9, 1964. Petitioners' Motion for a New Trial was denied on October 7, 1964. Petitioners' application to the Supreme Court of the State of Louisiana for Writs of Mandamus, Certiorari and Prohibition was denied by decree of that court made and entered on October 26, 1964.

The jurisdiction of this Court in this case is invoked pursuant to Title 28, United States Code, Section 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment First:

~~Section 1~~ "Congress shall make no law ... abridging the freedom of speech ... or of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment Fourteen, Section 1:

"No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

~~Civil Rights Act of 1964, Public Law 88-352, 88th Cong., H.R. 7152, July 2, 1964, 78 Stat. 241, et. seq.~~

Civil Rights Act of 1964, Title III, Desegation of Public Facilities:

Sec. 301. (a) Whenever the Attorney General receives a complaint in writing signed by an individual to the effect that he is being deprived of or threatened with the loss of his right to the equal protection of the laws, on account of his race, color, religion, or national origin, by being denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any state or subdivision thereof, other than a public school...

Louisiana Revised Statutes of 1950, ~~Section~~ Title 14,
Section 103.1,
Disturbing the Peace:

10

A. Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby:

(1) crowds or congregates with others, providing however nothing herein contained shall apply to a bona fide legitimate labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions, in or upon a shore protection structure or structures, or a public street or public highway, or upon a public sidewalk, or any other public place or building, or in any hotel, motel, store, restaurant, lunch counter, cafeteria, sandwich shop, motion picture theatre, drive-in, beauty parlor, swimming pool area, or any sports or recreational area or place, or any other place of business engaged in selling or serving members of the public, or in or around any free entrance to any such place of business or public building, or to any building owned by another individual, or a corporation, or a partnership or an association, and who fails or refuses to disperse and move on, or disperse or move on, when ordered so to do by any law enforcement officer of any municipality, or parish, in which such act or acts are committed, or by any law enforcement officer of the state of Louisiana, or any other authorized person, or

(2) insults or makes rude or obscene remarks or gestures, or uses profane language, or physical acts, or indecent proposals to or toward another or others, or disturbs or obstructs or interferes with another or others, or

(3) while in or on any public bus, taxicab, boat, ferry or other water craft or other vehicle engaged in transporting members of the public for a fare or charge, causes a disturbance or does or says, respectively, any of the matters or things mentioned in sub-section (2) supra, to, toward, or in the presence of any other passenger on said vehicle, or any person outside of said vehicle or in the process of boarding or departing from said vehicle, or any employee engaged in and about the operation of such vehicle, or

(4) refuses to leave the premises of another when requested so to do by any owner, lessee, or any employee thereof, shall be guilty of disturbing the peace.

B. Whoever commits the crime of disturbing the peace as defined herein shall be punished by a fine of not more than two hundred dollars, or imprisonment in the parish jail for not more than four months, or by both such fine and imprisonment. Added Acts 1960, No. 69, § 1.

11

Questions Presented

Petitioners, all residents of East and West Feliciana Parishes, Louisiana, were arrested and convicted on charges of disturbing the peace under a Louisiana statute R. S. 14:103.1 for their failure to vacate a public area of the Audubon Library Building, a library operated by the three parishes of East Feliciana, West Feliciana and St. Helena, jointly, in the Town of Clinton, Louisiana, after being requested to leave by the librarians and by the sheriff. The evidence showed that petitioners had entered the library to use the facilities available to the public. No evidence that petitioners were loud or boisterous or that any breach of the peace occurred was offered. Evidence was presented, however, showing that petitioners, all Negroes, were asked to leave, although not disorderly, because it was the policy of the library not to ~~serve~~ permit Negroes ~~at~~ to use that building.

Did the arrest and conviction of the petitioners deprive them of rights protected by

(1) The Due Process clause of the Fourteenth Amendment to the Constitution of the United States in that they were convicted without any evidence of the essential elements of the crime;

(2) The Due Process clause of the Fourteenth Amendment in that they were convicted under a statute which, as interpreted, was so vague and indefinite as to afford no ascertainable standard of criminality;

(3) The Due Process and Equal Protection clauses of the Fourteenth Amendment in that their arrests and convictions constituted enforcement of racial segregation;

(4) The First Amendment, as made applicable to the states through the Fourteenth Amendment, in that petitioners' freedom of expression has been abridged; ~~on Title III of~~

~~[illegible] Change~~

(5) ~~The~~ Title III of the Civil Rights Act of 1964 in that such arrests and convictions constitute an attempt to punish petitioners for exercising their right to be free of discrimination?

Statement of the Case

On March 7, 1964, about 11:30 A.M., petitioners, all Negroes, entered the public reading room of the Audubon Regional Library in the town of Clinton, Louisiana. The ~~Library~~ library is jointly operated by three Parishes ~~jointly and partially~~ and is supplied, in part, by the Louisiana State Library. It maintains three branches and two Bookmobiles as its "points of service" (R. 103, 109, 114-115). The ~~Blue~~ Red Bookmobile ~~operates~~ ~~served~~ services the white residents and their schools. The Blue Bookmobile operates in the Negro area and services the Negro residents and their schools (R. 109, 115, 128-129, 137).

¶ To use the library, a person must be a "registered borrower" (R. 111). All Negroes are registered through the Blue Bookmobile, by the Negro ~~l~~ librarian in charge. (R. 128-129, 137-138). A card ~~A~~ ~~card~~ is then issued, with the ~~name~~ word "Negro" stamped on it (R. 137). White persons cannot use the Blue Bookmobile, to register or check out a book. They ~~is~~ are referred to ~~one of the~~ the nearest Branch or to the Red Bookmobile (R. 137-138).

¶ At no time ~~does~~ can a Negro pick up (R. 95, 98) or return (R. 112, 114, 116) a book ~~[illegible]~~ ~~[illegible]~~ at the Audubon Regional Library. Petitioner Brown was told ~~When [illegible] petitioner Brown~~ that his book would be mailed or he could pick it up at the Blue Bookmobile (R. 95, 98). To return the book, he was to mail it or bring it to the Blue Bookmobile (R. 112, 114, 116).

~~14~~ 15

Never before March 7, 1964 had a Negro been seen at the Audubon Regional Library, though it has been in existence since 1961. (R.102) Neither the librarian (R. 120) nor the sheriff (R. 132) had ever seen a Negro enter the library.

After petitioners entered the library, Petitioner Brown requested a book. Brown was told by the librarian that the book was not available, and she would have to be sent for it (R. 95).

Moments later, petitioners were told to leave. The ~~Assistant~~ Assistant Librarian "assumed" they would leave because she did not have the ~~[illegible]~~ book, (R. 96). After a second demand, ~~[illegible]~~ ~~met with silence~~ she called in the Regional Librarian, ~~who came~~ (R. 103), who also ~~She also~~ told petitioners to leave. Petitioners, in response to these requests, remained ~~remained, quietly, standing~~ in the reading room (R. 96, 121). They said nothing and did nothing (R. 96). At no time were they noisy or boisterous, (R. 97, 121).

~~¶ Petitioners were seeking by their acts, the Sheriff testified, to effect a change ~~[illegible]~~ of~~

Testifying that she was "disturbed" by the presence of petitioners (R.126-127), the Regional Librarian offered no evidence as to what it was that petitioners did to cause her to be distrubed. Her concern was not communicated to anyone present at the time. In fact, no one objected to any activity of petitioners other than their presence in the reading room.

About 9:00 that morning, the sheriff was notified by his deputy that "something" was going to take place at the library (R. 117-118) He was not called, however, ~~the~~ by either librarian or anyone at the library (R. 107, 131). All morning the Sheriff watched and waited for petitioners, until he finally saw them come down the street (R. 117) and enter into the Library (R. 118). He immediately called his Deputies ~~on~~ (R. 118-119, 131) and dispatched them to the library building. The Sheriff ~~estimated the~~ stated ~~it~~ that he and his Deputies arrived ~~at the library~~ there approximately five minutes after petitioners (R. 131).

#19

Petitioners were seeking by their acts, the Sheriff testified, to effect a change of the policy of segregation in the Audubon Regional Library (R. 118). Prior to arresting petitioners, however, the Sheriff did not directly ascertain whether petitioners intended to use the facilities at the library building (R. 122-123). Only after petitioners were taken to jail did the Sheriff ask them why theywere at the library. (R. 118). Before this time, he had no conversation with petitioners (R. 120).

After the librarians told the Sheriff they had ordered petitioners to leave the building, the Sheriff also demanded that they leave (R.116). He presented them with the choice of leaving the building or being arrested. (R.117, 121).

When petitioners indicated they would not leave, they were arrested (R.117). They were not arrested, however, because their actions were considered a demonstration (R.120). Having made no noise (R.121), their disturbance consisted solely of their refusal to leave the library (R.121). Their subsequent arrest was entirely due to petitioners' refusal to obey the demands of the librarians or the Sheriff.

~~20~~ 21

A Bill of Information was filed by the District Attorney on March 11, 1964, and petitioners appeared for trial on March 24, 1964. The trial was completed on April 9, 1964.

At the outset of the trial petitioners moved to quash the Bill of Information on the grounds (a) that the Bill did not inform petitioners of the crimes of which they were accused, (b) that the statute referred to therein was unconstitutional for vagueness, (c) that the statute and Bill fail to allege criminal or specific intent, (d) that the Bill and prosecution violate the First and Fourteenth Amendments to the Constitution of the United States by depriving petitioners of freedom of assembly and equal protection of the laws, and (e) that the statute and Bill represent an unlawful delegation of legislative powers.

Petitioners' Motion to Quash was denied, as was petitioners' demand for certain particulars regarding the elements of the offense charged by the State (~~T. 14~~)(R. 69).

The District Court found all petitioners guilty as charged (~~T. 126~~)(R. 139). On July 14, 1964 petitioners timely moved for a new trial on the ground that no evidence existed in the record to support the judgment. This motion was denied on the same day and the petitioners were thereupon sentenced as follows:

Petitioner Brown; $150 and costs, and in default of payment of the fine, 90 days in the parish jail.

Petitioners Kelly, Bibbins, Smith and McKinzie; $35 and costs, and in default of payment of the fine, 15 days in the parish jail. (~~R. 29~~) (R. 3)

On July 28, 1964 nine separate Bills of Exceptions were filed relating to rulings of the District Court, including the denials of the demands for particulars, the Motion to Quash and the Motions for a New Trial (R. ~~12-26, 30-31~~). (R. 8-32). Per curiam opinions with regard to the nine Bills of Exceptions were rendered by the District Court on October 7, 1964 (R. ~~32-37~~). (R. 8-32).

Pursuant to a Notice of Application for Supervisory Writs filed on July 28, 1964, petitioners sought review ~~under Louisiana Procedure~~ of the judgment ~~or~~ of conviction and sentence by the Supreme Court of Louisiana (R. ~~2-38~~). (R. 8-32). Under Louisiana law no direct appeal procedure was available, since the fines imposed were less than $300 and the jail terms less than six months. Writs of mandamus, certiorari and prohibition were sought under the general supervisory jurisdiction of the Supreme Court of Louisiana (Louisiana Constitution, Article VII, Section 10) and in accordance with Rule 12 of the Louisiana Supreme Court Rules.

On October 26, 1964, the Supreme Court of Louisiana unanimously denied petitioners' applications for writs of mandamus, certiorari and prohibition, holding that there was no error in any of the rulings and judgment of the District Court (~~R. 1~~). (R.32). On October 28, 1964 bench warrants were issued by the District Court to effect execution of the sentences imposed upon petitioners. ~~(R.)~~. The District Court then adjourned until November 2, 1964. ?

On October 28, 1964 petitioners filed a petition with the Supreme Court of Louisiana for stay of execution of sentences, requesting 90 days to enable petitioners to file a Petition for Writ of Certiorari with this Court (~~R. 39-41~~). (R. 33-36). Initially petitioners were refused the stay, being advised that such stays would thereafter be issued only by the District Court. Petitioners Smith and McKinzie were arrested pursuant to the District Court's bench warrants on October 30, 1964.(~~[illegible]~~)

On November 2, 1964 petitioners applied to the District Court for a stay of execution pending preparation of their petition to this Court for a Writ of Certiorari. The application for a stay was denied that same day (~~R. 51~~). (R. 46). On November 4, 1964 (following the Election Day holiday when the courts were closed) petitioners again applied to the Supreme Court of Louisiana for a stay, or alternatively for writs of habeas corpus and mandamus (~~R. 42-50~~). (R. 37-44). At that point the petitioners' first petition, which had been filed on October 28, 1964, was granted, but the stay of execution of the sentences was limited to a period of thirty days from November 4th.(~~[illegible]~~). The stay was subsequently extended for an additional thirty days, expiring on January 4, 1965.(~~[illegible]~~).

How Federal Questions Were Raised

The Federal questions presented here were raised in the District Court by written Motion to Quash (~~R. 15-16~~) (R. 12-14) and written Motion for a New Trial (~~R. 26~~) (R. 31-32) and by written Bills of Exceptions to the denial of such motions (R. 8-32), and in the Supreme Court of Louisiana by application for Writs of Mandamus, Certiorari and Prohibition (~~R. 4-7~~). (R. 3-6).

Petitioners accordingly raised their Federal claims at the earliest opportunity and renewed them at each stage of the proceedings below.

Reasons for Granting the Writ

The convictions below conflict with applicable decisions of this Court on important constitutional issues. If the conviction be upheld on the facts in this record, statutes such as we have before us can effectively be utilized to circumvent and nullify constitutional rights reaffirmed by the Civil Rights Act of 1964.

ARGUMENT

POINT I

The convictions below violate Constitutional guarantees of due process of law.

A. The Convictions Below Were Totally Unsupported by the evidence.

The material facts of this case virtually duplicate those in Taylor v. Louisiana, 370 US 154, 82S.Ct.1188 (1962), in which this Court held that a conviction of disturbing the peace could not be upheld under L.S.A.R.S. Sec.14:103.1 (the same statute under which this conviction was rendered) if the only evidence was that petitioners "were violating a custom that segregated people in waiting rooms". The "mere presence" of Negroes in a white waiting room is not likely to give rise to a breach of the peace. 370 US 154,155. In effect such evidence without more constitutes no evidence of disturbance of the peace, and the conviction falls under the rule of Thompson v. Louisville, 362 US 199, 204, 206, where the court held that a conviction in a state court must be set aside "if there is no support for these convictions"or "the record is entirely lacking in evidence to support any of the charges," or is "without evidence of his guilt." Not present here is a statement common to many similar trials that the on-looking whites seemed disturbed.

As much as the waiting room of an interstate bus station, the reading room of a public library is clearly an area in which segregation cannot be enforced. See also Wright v. Georgia, 373, US 284, where six Negro petitioners were peacefully playing basketball in a public park, and the court found no evidence of any activity which might be thought to violate a breach of the peace statute; Mayor and City Council of Baltimore City v. Dawson, 350 US 877, where city could no longer enforce racial segregation in enjoyment of public beaches and bathhouses; Holmes v. Atlanta 350 US 879; where city was restrained from denying Negroes the right to use the public golf course. Gayle v. Browder, 352, US 903, where city could no longer require segregation on motor buses. New Orleans City Park Improvement Asso. v. Detiege, 358 US 54 where municipality was enjoined from denying Negroes use of the park facilities.

No ground for the District Court's decision other than that petitioners, Negroes, chose to remain quietly in the public area of the library after being asked to leave (R.140). The record is bare of proof of any activity which supports a finding that there was any other element of the crime charged. The entire findings of fact by the District Court are as follows:

> "The evidence clearly shows that these 5 men went into the library, that they asked for a book and were served, at least their order was taken. Of course, the library at that time, being occupied only by two female library-workers, they then asked the parties to leave. This was done twice, and finally the Sheriff again asked them to leave...."
>
> "Clearly the evidence shows that these parties did not congregate when they came to the town of Clinton to the Audubon Parish Library, merely for the purpose of seeking service; that they had a specific motive and a specific intent, ans that was, as was shown beyond any reasonable doubt, to refuse to leave the library even after they had been served, and after they had been requested three times (R.140)."

Louisiana statute 14:103.1 requires proof of an intent to provokesa breach of the peace or acts "under circumstances such that a breach of the peace may be occasioned." The Sheriff, by his own testimony, stated that he never ascertained the facts regarding either element of the crime as defined vy the statute (R.119-121). He did not know of his own knowledge nor did anyone communicate to him facts indicating whether or not petitioners intended to provoke a breach of the peace or that a breach of the peace might be occasioned by their conduct. No proof of an intent to distrub the peace can be inferred from the fact that peitioners may be members of the Congress of Racial Equality, an organization to test and eliminate racial discrimination. See Taylor v. Louisiana, 370 US 154, 156 (1962), where eveidence was offered to show that the demonstration was part of a "preconceived plan" and this Court stated that such evidence had no bearing on whether there could be a conviction for disturbing the peace. The mere assertion that the Regional Librarian felt "disturbed" by the presence of Negroes in the branch library thereto reserved for white persons can not support such a finding. Wright v. Georgia 373 US 284, 292-293 and Taylor v. Louisiana, 370 US 154.

B. The Elements Necessary to Establish a Breach of the Peace Under Louisiana Law Were Carefully Analyzed by This Court in Garner v. Louisiana, 368 US 157, 82 S.Ct.248

In Garner Negroes took seats at lunch counters where only white persons customarily were served, and they remained quietly in their seats after being told they could not be served there. This Court found "The records barren of any evidence that would support a finding that petitioners' conduct would even 'foreseeably' have disturbed the public." 368 US 157, 166. No issue was to the right of petitioners to seek service in the public library can exist. Accordingly the issue raises no questions of trespass and is that much sharper as to the illegality of the arrest and the subsequent conviction.

At the time of the arrests, there were in the library only the five petitioners, two members of the library staff, the Sheriff and two or more deputies ~~(T. 89)~~ (R. 116). No evidence tending to show likelihood of any disturbance of any kind ~~(T. 102-103)~~ (R. 126-127) was offered. No one exhibited any concern or agitation. There was no noise—the only conversation appeared to be that resulting from the statements of the librarians and the Sheriff and the answers of one petitioner to their questions ~~(T. 62, 96-97)~~ (R. 97, 121-122). Not even the barest indications of an imminent breach of the peace were present. *Cantwell* v. *Connecticut,* 310 US 296. The Sheriff testified flatly that the sole element constituting grounds for the arrest of the petitioners was their refusal to leave when ordered to do so by him ~~(T. 95)~~ (R. 121). No ascertainable reason for demanding that petitioners leave the library exists (other than their color), and no reason in law or facts exists for their subsequent arrest.

~~Answer [illegible] position that [illegible] had been no lawful business in library - ? (cf p. [illegible] of [illegible] to [illegible] [illegible])~~

C. The Louisiana Statute as Applied to These Petitioners Was Vague, Uncertain and Indefinite

Were this Court to assume, *arguendo,* that Sec. 14:103.1, in requiring only that an accused's conduct take place "under circumstances such that a breach may be occasioned thereby," removes the necessity of determining that such conduct could "foreseeably disturb or alarm the public," it might be argued that even though the facts here do not meet the standards enunciated in *Garner* v. *Louisiana,* the new statute's less rigorous standards have been met. ~~To~~ But to accept this argument would in effect admit that the new

~~27~~ 28

statute fails to specify any ascertainable standard of criminality. Read in this manner, Sec. 14:103.1 ~~would~~ place upon the ordinary citizen the burden of guessing whether a breach of peace might be occasioned by any given set of circumstances, regardless of whether such result is reasonably foreseeable at the time. Some spectators to one's presence, timid souls, might be easily alarmed; others, heartier by nature, might not become apprehensive so quickly at the sight of a Negro in a "white only" library. To require one to speculate as to consequences of one's presence is to place one at the mercy of irrationality and deprive one of life, liberty and property without due process of law; speech, and its free exercise is rendered into the tender hands of the know-nothing. See lanzetta v. New Jersey, 306 US 541, 543; United States v. L. Cohen Grocery, 225 US 81, 89; Connally v. General Construction Co., 269 US 385, 591. In no way can the facts in this case be compared with Cox. v. Louisiana 379 US 536. Nor is there any question here of the reasonable nature of any regulation directing the time and place for the use of these facilities so far as these appellants are concerned, Negroes all, the ban was absolute.

By enacting Sec. 14:103.1 the State of Louisiana has attempted to abandon the vixing of any standard of criminality. Where a statute so vaguely worded is used to punish conduct-such as the use by persons of public facilities to which they have a constitutionally protected right-the statute must be held unconstitutionally vague, uncertain and indefinite. Wright v. Georgia, 373 US 284, 293; Winters v. New York, 333 US 507.

POINT II

The convictions below constitute ~~[illegible]~~ enforcement of racial segregation in violation of Constitutional guarantees of equal protection of the laws and statutory guarantees of freedom from punishment for exercising rights to non-segregated use of facilities.

The evidence below clearly delineates the pattern of segregation which characterized the operations of the Audubon Regional Library ~~(T. 63, 94, 110-111, 124)~~ (R. 98, 120, 132, 137). ~~[illegible]~~ Elaborate rules regarding the correct "point of service" for users of the library effectively segregated Negroes to the "Blue Bookmobile" ~~(T. 77, 83, 86, 88)~~ (R. 109-110, 112, 115-116). ~~were in effect~~. Only persons registered at a specified "point of service" were afforded access to browsing and reference shelves and other reading room facilities at such "point of service" ~~(T. 82-83, 104-106)~~ (R. 111-112, 128-129). Registration cards issued at the Blue Bookmobile were stamped with the word "Negro" and white persons were not registered there ~~(T. 120-121)~~. (R. 137).

Against this pattern of segregation of facilities the arrest and conviction of the petitioners takes on added significance.* The Constitution of the United States forbids enforcement of segregation of public facilities. *Brown* v. *Board of Education*, 347 US 483, 495. To continue the effects of segregation through the use, by public officials, of vaguely worded statutes can only undermine the substance of the holdings of this Court supportive of constitutional guarantees to equal protection of the laws.

---

[*] Interestingly, the Trial Court claimed this trial was a simple "breach of peace" case ~~(T. 83)~~ (R. 112) with no segregation overtones; ~~this~~ nevertheless ~~after~~ the District Attorney ~~spent~~ expended the first 58 pages in an transcript attempting to show CORE's involvement.

Before us, we have a record making clear that the conviction of petitioners had as its primary purpose the deterrence of Negroes from using the "white" library facilities theretofore denied to them. Such a purpose, ~~without citation~~, is clearly in conflict with the Constitution. Absent a showing of independent criminal activity, the convictions constitute an unconstitutional attempt to enforce segregation by the State of Louisiana and accordingly should not be allowed to stand. See *Garner* v. *Louisiana,* 368 US 157, 181.

POINT III

Petitioners having presented themselves peacefully, the convictions below constitute a denial of petitioners' rights of freedom of expression and assembly and constitute a denial of the right to redress a public grievance.

The evidence below shows that petitioners were not only engaged in an attempt to seek to use the public facilities of the Audubon Regional Library, but that they were also engaged quietly in ~~demonstrating against and~~ protesting the illegal segregation policies and practices of that library and thereby to seek the correction thereof (~~T. 43-48, 53-55, 90-91, 108~~ R. 85-88, 91-92, [redacted] 117-118, 130). Indeed, the State's case appeared to be predicated on the theory that this activity alone constituted a material element of the criminal activity charged (~~T. 28-31~~). (R. 77-78). A conviction based on such grounds would clearly be in conflict with the Due Process Clause of the Fourteenth Amendment as it guarantees the First Amendment protection of freedom of expression and assembly. *Edwards* v. *South Carolina,* 372 US 229; *Garner* v. *Louisiana,* 368 US 157, 201-204 (concurring opinion); *NAACP* v. *Alabama,* 357 US 449, 461.

~~To have left the library at the direction of the ~~police~~ sheriff would ~~have~~ meant succumb to an illegal police order.~~ While there are risks attendant upon disobeying a police order, to make it a crime to disobey any police order,

(over

To have left the library at the direction of the Sheriff would have meant succumbing to an illegal police order. While there are risks attendant upon disobeying a police order, to make it a crime to disobey any police order no matter how wrongful, not only is to give in to injustice, butto participate in the installation of a police state. It is only in the police state that the refusal to obey a police order is a crime by itself. No act, even remotely improper exists before us except the refusal to obey the Sheriff, the very Sheriff who came to the library either to expel them, or arrest them. What honorable alternative does a man have at this juncture? If a man cannot stand peacefully in a public library without risking arrest where then is he safe? The arrest here had nothing to do with the maintenance of law and order, but occurred merely to retain the old order and to continue the denial of the constitution of the United States to Negroes in Louisiana.

POINT IV

Had these acts occcurred on or after July 2, 1964, arrests therefore would have been improper under Title III of the 1964 Civil Rights Act; accordingly the convictions should be abated.

In seeking to use the public reading room and other facilities of the Audubon Regional Library on a nondiscriminatory and non-segregated basis, petitioners were engaging in an activity which would be protected under the Civil Rights Act of 1964 had it been in effect. Accordingly, at this time, the convictions are in conflict with the provisions of that Act (Title III) and the prosecutions should be abated, the judgment vacated and the charges dismissed. *Hamm* v. *Rock Hill*, 379 US 306 ~~(No. 2 October Term 1964)~~, *Bell* v. *Maryland*, 378 US 226 ~~84 S. Ct. 1815.~~ ~~[illegible]~~

The acts complained of were certainly not evil in themselves, but at worst *arguendo,* merely wrongful because of the official maintenance of segregation and upholding of such practice by the usage of the White community. ~~Such~~ Since national policy on the use of public facilities is made clear beyond a peradventure by Title III, and since this application to this Court is part of the procedure on appeal of this case, the judgments of conviction are not yet final and accordingly such judgments should be abated and the bills of information dismissed. That the convictions were procured under state statutes by state courts is of little interest since we are here concerned with national policy protecting the peaceful use (as is the fact here) of public facilities.

Charles Oldham

~~32~~ 33

CONCLUSION

The conviction of petitioners below is unsupported by any evidence and was made pursuant to a statute unconstitutionally vague and uncertain. The conviction represents an attempt to use State power to enforce illegal racial segregation and denies petitioners their rights to the freedoms of expression and assembly. For all of these reasons the conviction and the decree of the Supreme Court of Louisiana upholding the conviction constitute state court decisions of substantial federal questions which are not in accord with applicable decisions of this Court.

It is respectfully submitted that the petition should be granted.

Carl Rachlin
38 Park Row
New York, N.Y.

Robert F. Collins,
Nils R. Douglas,
Lolis E. Elie,
2211 Dryades Street
New Orleans, La.

Murphy W. Bell
971 S. 13th Street
Baton Rouge, La.

Attorneys for Petitioners

Of Counsel:

Floyd McKissick,
Marvin Karpatkin,
Pierre A. Tonachel,
Ellis Bert,
Charles Oldham

SEDFRE

BROWN, SAMUEL VS. DEFENSE DEPARTMENT VIRGINIA 1965
(MILITARY DISCRIMINATION)

Box 34
Folder 32

Historical Society of Wisconsin

Please Retain Original Order

Copy Stickney April 1, 1965

608 HALIFAX ST
PETERSBURG, VA.

To: Equal Opportunities committee
c/o Col. Preiss, Chairman:

This letter is written to ask the consideration of the Fort Lee Equal Opportunity Committee of conditions which as an employee I feel that I am unable to defend myself against. The conditions to which I refer can be found I think in comparing the training of Negro employees who occupy a grade of GS5 or above with a White employee at a similar grade, then compare the grade increases received by each. Negros have moved less than half the distance that White employee have moved despite the Negro having higher educational qualifacations at the beginning.

There are several techniques used to accomplish the kind of situation described above. A common way is "Re-organization", this technique has been used successfully to employ a retiring military man when according to Civilian Personnel there was only one other candidate for the position. The space is held until the white employee can be hired within the law, and the Negro is left out in the cold. The Whitten amendment is used effectively to prevent the Negro being considered for a supervisory position by granting the Negro a grade promotion just before announcing the open position which is two grades higher.

The provision which would allow the Negro to advance is not applied and the White received the position. The opportunities for self improvement education under the army training program are seldom mentioned to the Negro employees because in most cases Negros are not considered for future development or assignment in supervisory positions at Fort Lee. Often times programs to be initiated by the Civil Service will be discussed among civilian employees through conversation, the schemes to accomplish the exclusion of Negros are formulated and carried out before the Negro even hears of the program. If this does not happen, the Negros' form may be held at

Copy

Civilian personnel until the closing dates are past and then returned with some flimsy excuse given verbally. Efforts by Negros at self development assistance from Civilian Personnel are usually turned down because you must have a job in the educational series to receive assistance in financing studies needed. There is rarely any suggestion from personnel on overcoming the problem of how to get out of a job which offers no opportunity to work which overcomes the situation. There are so many white employees who are supervisors and have started ~~since~~ after many of the Negros they now supervise.

There are other conditions which allow this imbalance of opportunity to continue to grow. The in-take programs have not gotten into the minority high schools in the area. The schools have not instituted programs based upon the needs of Fort Lee as outlined by the Civilian Personnel office. The White students continue to get the jobs and Negros wait for relief. The Negros on this post fortunate enough to be employed have received little or no opportunity to advance regardless of the effort made.

This is the condition which I find at Fort Lee today, some of the problems have been dealt with before by other committees who seemed to want to bring a favorable report in place of the true facts. My conversation with several members of this committee leads me to believe that every effort to determine the validity of the assertions made in this letter will be made. I would be most honored and happy to answer any questions that may arise concerning anything that is not clear.

Thank you sincerely,

Samuel L Brown

Samuel L. Brown

Copy

18 Jun 1965

AIBFGA

Mr. Samuel L. Brown
603 Halifax Street
Petersburg, Virginia

Dear Mr. Brown:

This is in reply to your letter of 2 April 1965 to the Equal Opportunities Committee, in which you make several general statements regarding personnel practices or conditions at Fort Lee, Virginia.

A sub-committee was appointed to investigate the conditions described in your letter. Since your statements were very general in nature, members of the sub-committee have on several occasions talked with you in an effort to obtain more specific information, such as names of persons, offices or activities involved and any approximate dates if pertinent to the action. This information was needed in order to make a thorough investigation. It is impractical for the committee to attempt to question all supervisors or other officials at Fort Lee in order to obtain leads relating to your statements. As of this date, you have not provided the members of the sub-committee with any specific facts on any statement contained in your letter.

Based on information furnished, a check of available records reveals the following general information, as related to certain of your statements:

a. "The opportunity for self-improvement education under the Army Training Program is seldom mentioned to the Negro employees because in most cases Negroes are not considered for future development or assignment in supervisory positions at Fort Lee." -- During FY 64-65, five (5) different courses were conducted. The qualifications for attendance varied with each course and the manner of selecting those to attend also varied. In some courses, quotas were allocated and the activity made the selection. In others, the names of all eligible personnel who had not had the course were furnished the activity and in other courses, the names of certain employees, based on review of their files, were recommended to the activity for attendance. Fifteen (15) Negroes attended the courses conducted.

18 Jun 1965
Copy

AIBFGA
Mr. Samuel L. Brown

b. "Efforts by Negroes at self-development assistance from Civilian Personnel are usually turned down because you must have a job in the educational series to receive assistance in financing studies needed." -- CPR T4.1 does not in any way limit assistance to only those persons whose jobs are classified in the educational series. A survey of those persons receiving assistance during FY 65 discloses that of forty-three (43) approved applicants, fifteen (15) employees are working in the education field. Twenty-eight (28) employees are working in various fields other than Education.

c. "The in-take programs have not gotten into the minority high schools in the area." -- The local high school and college in-take program is limited to clerk-typists and stenographers only. In 1964, fifteen (15) schools were contacted and eleven (11) schools desired to participate. Of this number, three (3) schools are known to be predominantly Negro. In 1965, out of thirty (30) schools contacted, twenty (20) schools desired to participate. Of this number, seven (7) are predominantly Negro. Two known Negro schools did not desire to participate in the program. Schools contacted are within the commuting areas of Fort Lee, Camp Pickett or Camp A. P. Hill, Virginia.

The Equal Opportunity Committee is vitally interested in any actions where equal treatment and opportunity was not afforded to any individual; however, specific facts are necessary in order to conduct a thorough investigation.

Sincerely,

HOLLIS J. PREISS
Colonel, GS
Chairman, Equal Opportunities
Committee

file copy

Copy

608 Halifax St.
Petersburg, Va.
Jul 28, 1965

To: Mr. W. H. Staples

Subject: Selection of Candidates

Dear Sir:

Enclosed please find duplicate completed forms QM 928.

This letter is written to inform you that there is a persistent rumor being circulated among the Civilian employees, that this position has already been filled and only the official acts remain. As you know many employees in the past have found fault with the use of JOA's for the very reason that people who file the QM 928 are usually way behind for the planning for filling the job has been completed before the announcement appears.

I would appreciate from you in writing an answer as to whether this position is one created for a particular employee or not.

Sincerely yours,

Samuel L Brown

Samuel L. Brown
Illustrator Mech. Arts (DOL)

Copy

CIVILIAN PERSONNEL OFFICE

AIBFCP 2 August 1965

Mr. Samuel L. Brown
608 Halifax Street
Petersburg, Virginia

Dear Mr. Brown:

Reference is made to your letter of 28 July 1965 regarding Selection of Candidates.

The announcement of vacancies and the selection of applicants for these positions are governed by the procedures outlined in Chapter N2, Placement, "Merit Placement and Promotion Policy and Procedures", copies of which have been distributed to all civilian employees and supervisors of civilians at this installation.

The position for which you applied, Visual Information Specialist, GS-1084-9, located in the U. S. Army Logistics Management Center will be filled through these procedures. If you are found qualified and placed in the Group I category, your name will be referred to the selecting official for consideration.

It is regretted that rumors may persist regarding any personnel action; however, unless we have specific information as to the individuals starting such rumors, no corrective action may be taken. Personnally, I am unaware that many employees have found fault with the "JOA"procedures in effect; however, I am aware that on occasion, some employees are not pleased with some selections, primarily because they were not selected. If you have specific and factual information as to any violation of our merit promotion plan, such information should be furnished the Civilian Personnel Officer immediately.

As no one in ALMC has discussed or requested the consideration of any individual with me, a preselection could not have been made as the applicants have not been rated nor reviewed, and will not be until the "JOA" is closed.

Sincerely yours,

W. H. STAPLES
Chief, Employment and
Services Branch

Copy

608 Halifax Street
Petersburg, Virginia
August 12,1965

Mr. W. H. Staples,
Chief Employment & Services Br.
Civilian Personnel Office

Dear Sir:

Reference is made to your letter of 2 August 1965. Regarding the selection of candidates under section f. N1-11 line 13.... Final selection of a candidate will be limited to goup 1. Following all interviews, the supervisor will notify Civilian Personnel Office as to his final decision or selection.... The man who I have been told is to get this job is Mr. Stan Milton.

Major Bantz said that Civilian Personnel will make the final selction for the position. The position requires according to the interviewer 50% work with the Zerox and Multilith machines, The interviewer implied that the work would be dirty,etc. The machines were not prominiently mentioned in the announcement. The number of persons selected for interview seem rather large when I know that some of the people have no college training, etc. Maj. Bantz talked as though this position were a job already being done and the agency is hoping for an additional space later.

In your letter you admit that you have heard no complaints about the "JOA" system therefor you must talk to some of the employees who have had experiences with the system. If you wish to talk to any I will tell them and you can.

ALMC In the person of Maj. Bantz says Civilian Personnel will make the final selection.

Sincerely yours,

Samuel L. Brown

Samuel L. Brown

Copy file copy

608 Halifax Street
Petersburg, Virginia
29 Sep 1965

To: Commanding General
Subject: Irregular Procedures (Civilian Employment)

Dear Sir:

This letter is written to report irregularities concerning the filling of a position of Visual Information Specialist GS 9 at the Army Logistics Management Center. On 28 July 1965 in a letter to Mr. W. H. Staples (Chief Employees Serv.) I reported that employees were discussing the position announced in "JOA" number 69, dated 22 Jul 1965 as being a job which represented a promotion for a particular employee (pre-determined). Mr. Staples assured me by letter dated 2 Aug 1965 that chapter N2, placement, "Merit Placement and Promotion Policy and Procedures", governed the selection of employees for the position.

After being interviewed by Major Bantz, again I wrote Civilian personnel 12 Aug 1965 telling (Mr. Staples) of the employee named Mr. Stan Milton being the worker to be selected for the position. No selection was made following the interviews of the qualified candidates. This violated the chapter governing selection of employees.

On August 27, 1965 Announcement No. 87 appeared re-announcing the same position. This time the "JOA" says the selected candidate would be detailed for 60 days, to test the fitness of the employee for formal and continuing employment. My letter to Mr. Corbett (Persnl Man Spec.) is still unanswered requesting pertinent regulations and reasons for the departure from established procedures. Mr. Corbett told me that as a qualified candidate I would be given an interview to discuss the special considerations which made detailing Necessary. (over)

Major Bantz calls me to ask if I wish to be interviewed. The pertinent Chapter say Civilian Personnel will group qualified candidates, etc. This call came on Sep. 27, 1965. The irregular quality involved is that Major Bantz says there are no special qualities to this position, but Civilian Personnel Management Specialist Mr. J. Corbett says there are special considerations making it necessary to "Detail" an employee into the position for a trial period. Please give me and other interested Negro employees the opportunity for advancement that we deserve.

Sincerely yours,

Samuel L Brown

* Note

This portion is hand written because the typed file copy could not be reproduced. This written copy is accurate however.

Sam Brown

Copy

1 October 1965

Mr. Samuel L. Brown
608 Halifax Street
Petersburg, Virginia

Dear Mr. Brown:

Your letter of 29 September 1965 to the Commanding General, Quartermaster Center and Fort Lee has been referred to me for reply. The authority and responsibility for placement and promotion actions involving positions in the Army Logistics Management Center belong to the Commandant of that activity. He has designated me to act for him in the conduct of civilian personnel administration.

I am informed that the reason for filling the position of Visual Information Specialist, GS-9, in the manner described in Job Opportunity Announcement Nr. 87 is due to the selecting supervisor's difficulty of determining by interview and review of records whether an applicant has originality and technical versatility to a degree warranting the filling of the position on a continuing basis. While this method of final selection is not the usual one, the regulations permit such providing that the individual chosen for detail is selected in accordance with merit promotion procedures. This is being done and you are one of six candidates who are being considered.

As a matter of information, the merit promotion procedures do not require that positions be filled per se. They may not be filled, however, except through these procedures or authorized extensions thereof.

The Commandant, U.S. Army Logistics Management Center has reviewed your letter and wishes that you be assured that it is his policy and personal desire that all qualified candidates for positions under his command receive equal consideration for all employment opportunities that arise.

A. LYLE VENABLE
Civilian Personnel Officer

Copy

608 Halifax Street
Petersburg, Virginia
October 20, 1965

Mr. Lyle Venable
Civilian Personnel Officer
Fort Lee, Virginia

Dear Sir:

This letter is written in answer to your recent letter. I am called "Negro" and so there must be some difference in my mental make-up which prevents me from communicating with you and others like you. Your letter failed to touch on the main topic which prompted me to address myself to the Commanding General at Fort Lee. The topic to which I refer is fair play. As an employee of the Army I question the authority of no Commandant or other official of Fort Lee, however there is certainly clarity in these acts which I see daily that exclude me and other black americans like me . There can be no fair play in the selection of candidates for a position when one employee is favored over another at the outset. You speak of originality and technical versatility in your letter and so I ask you, What was used as criteria to determine the amount of originality or versatility which I might possess? These attributes cannot be shown on a written application. Therefor the only candidate who showed these potentials was the man given the assignment of performing the position. If as a black man I were to receive this kind of consideration to perform for higher positions I would not complain but I am not. Further, these things could not exist and continue except that some where a bond between those who do these things and those who allow them continue to stand against all appeals for equal opportunity..
The Civilian personnel employees cannot even evaluate a 201 file

Copy

properly it seems .

It seems unbelieveable that my file would have no record of me taking leave without pay to attend Virginia State College or that my file would fail to reveal that I attained the BS degree yet that is what Mr.Corbett would have me believe. By footnote he tells me that my file reveals that I have completed three years of College.

Mr. Venable for nearly 14 years now I have watched the conniving and scheming that white employees practice to attain high ratings grades a awards and the like my only complaint is that I am excluded.When I enter the rules change I must have a degree, the law changed while you were away. This is all baloney really, where there is the will the regulations provide the way. The end of such practices will come soon for this way cannot endure much longer, these are the real causes of the riots and the demonstrations for the young people have seen the blacks who try to play by the white man rules refused time and again. The reason my letter was not addressed to you from the beginning was that as an employee I know that the things which occur could be stopped at once if you wished them stopped.

Thank you for taking the time to write me a letter, but you really failed to make me understand. The regulations used to put the candidate into the position were convenient perhaps some day the right will prevail.

Sincerely yours,

Samuel L Brown

Samuel L. Brown

Copy

26 October 1965

Mr. Samuel L. Brown
608 Halifax Street
Petersburg, Virginia

Dear Mr. Brown:

I have no wish to engage in a protracted exchange of letters with you in an attempt to alleviate your disappointment in not advancing your career. From the tone and content of your recent letter, I am not at all sure that you are doing all that you can to help yourself advance.

It is most believable that your official personnel folder does not indicate that you have attained a B.S. degree as you have never presented this information for inclusion in your file. There is a copy of an official, approved request from you to take leave of absence for that purpose, but until you provide official information that you did attain the degree this office will have no record thereof. I note that your most recent S.F. 57 was prepared in 1955. I suggest that you bring it up to date.

You should also be aware of the rather obvious fact that the possession of a degree, per se, will not necessarily qualify any of us for any position that we seek, and when it does, it does not automatically make us the best qualified of all who seek the position.

If I may make a friendly suggestion to you, it may be to your benefit if you will evaluate your own "interview techniques." By this I mean do you really try to convince the selecting supervisor that you are an individual who will be cooperative, loyal, dependable and easy to work with in addition to your technical or professional qualifications? If your attitude toward those who interview you is similar to that expressed in your letter about the people in my office (who certainly have nothing to gain by frustrating you in any of your attempts to advance), you may be creating a negative picture of your potential value for the selecting supervisor's operation.

Sincerely yours,

A. LYLE VENABLE
Civilian Personnel Officer

Copy

608 Halifax Street
Petersburg, Virginia
Nov. 12, 1965

Mr. Lyle Venable,
Civilian Personnel Officer
Fort Lee, Virginia

Dear Mr. Venable:

This letter is written in answer to your recent letter. I have no desire to engage in any protracted exchange of letters with you however my interest in obtaining information prompts me to inquire again concerning those practices which I mentioned previously.

On or about June 20, 1964, I came to Civilian Personnel and informed Mr. Currier that I had received my B. S. Degree , Mr. Currier made note of this information and put it in my file in my presence. If this information is no longer in my file then some questions are in order. I sent to Civilian Personnel a SF 57 in response to Education Specialist Examination (Announcement No. 3-108-1 (1962) which I assumed would be noted in my 201 file.

There is no information to combat the assignment of individuals to perform jobs and then select those individuals as best qualified. This happened in the selection of Mr. Stan Milton and is about to happen in the selection of a person to fill JOA 127.

Of course I am aware that having a degree will not insure an employee of any color being best qualified, but if one employee has a degree and the other does not these employees are not equal in training .The practice of detailing employees to perform jobs and then making a selection on this basis is contrary to the idea of competition in selecting employees and this is what I am complaining about. If you will not concern your self with this aspect of my letter please indicate to me whom I should consult.

You say people in your office have no interest in preventing me from advancing, yet a person in your office attached a note to my SF 57 directing a selecting officer to "see arrest record".

Thank you for consideration and cooperation in settling this issue once and for all if possible.

Sincerely yours,

Samuel L Brown
Samuel L. Brown

RECORD OF TRAINING
(CPPM-1)

1. DATE
3 February 1961

2. INSTALLATION AND ORGANIZATION
Fort Lee, Virginia

3. LAST NAME - FIRST NAME - MIDDLE INITIAL
Brown, Samuel L.

4. TITLE OF COURSE
Basic Supervision

5. DATE COURSE COMPLETED
1-26-61

6. TOTAL COURSE HOURS
30

7. RATING OR GRADE
Satis.

8. COURSE DATA [1]
17 Units in the CPP No. 41-B series

9. REQUIREMENTS FOR SATISFACTORY COMPLETION OF COURSE [1]
Attendance at all sessions
Classroom participation

Copy

10. REMARKS ON TRAINEE PERFORMANCE [1]

11. SIGNATURE OF TRAINING OFFICER
Claude Harbaugh
CLAUDE HARBAUGH

12. THE CONTENTS HEREOF HAVE BEEN REVIEWED
HEAD OF ORGANIZATIONAL ELEMENT (Signature)
Bruce E. Fleming

13. POSTED TO DA FORM 80 OR 80A | INITIALS | DATE

FORWARD TO TRAINEE AFTER COMPLETION OF ITEMS 12 AND 13
[1] *USE REVERSE IF NECESSARY IDENTIFYING BY ITEM NUMBER*

DA FORM 1 SEP 54 **750** REPLACES DA FORM 750, 1 JUL 53, WHICH IS OBSOLETE

GPO : 1954 O - 316470

11526

new file

RECORD OF TRAINING
(CPPM-1)

1. DATE
5-16-61

2. INSTALLATION AND ORGANIZATION
Ft. Lee, Va.

3. LAST NAME - FIRST NAME - MIDDLE INITIAL
BROWN, SAMUEL L.

4. TITLE OF COURSE
Advanced Supervision

5. DATE COURSE COMPLETED
5-12-61

6. TOTAL COURSE HOURS
30

7. RATING OR GRADE
Sat.

8. COURSE DATA [1]
Civ. Pers. Pamphlet No. 41-B series -
10 sessions
Principles of Work Management -
9 sessions

9. REQUIREMENTS FOR SATISFACTORY COMPLETION OF COURSE [1]
Attendance at all sessions
Classroom participation

Copy

10. REMARKS ON TRAINEE PERFORMANCE [1]

11. SIGNATURE OF TRAINING OFFICER
Claude Harbaugh
CLAUDE HARBAUGH

12. THE CONTENTS HEREOF HAVE BEEN REVIEWED
HEAD OF ORGANIZATIONAL ELEMENT (Signature)
Bruce E. Fleming

13. POSTED TO DA FORM 80 OR 80A | INITIALS | DATE

FORWARD TO TRAINEE AFTER COMPLETION OF ITEMS 12 AND 13
[1] *USE REVERSE IF NECESSARY IDENTIFYING BY ITEM NUMBER*

DA FORM 1 SEP 54 **750** REPLACES DA FORM 750, 1 JUL 53, WHICH IS OBSOLETE

☆ GPO : 1954 O - 316470

Copy

U.S. ARMY QUARTERMASTER SCHOOL
FORT LEE, VIRGINIA

IN REPLY
REFER TO:
AIBFQS-EN Brown, Samuel L (Civ)

24 May 1963

SUBJECT: Extension Course Information

THRU: Civilian Personnel Officer
Fort Lee, Virginia

TO: Samuel L Brown
Second U S Army Tng Aids Center
Bldg T-5206, Fort Lee, Virginia.

1. You have completed QM 90, Effective Army Writing

a. Rating ☐ Superior ☐ Excellent ☑ Satisfactory ☐ Unsatisfactory

b. Date mailed to student 9 Jan 63 Date completed 21 May 63

c. Credit hours earned for subcourse 32

d. Credit hours earned during current retirement year

e. Credit hours earned during previous retirement year

☐ 2. You are deficient in the subcourse. Deficiency may be removed by completion of a revised edition or repeat of the same edition after one year. This does not affect your enrollment in Quartermaster Army Extension Courses.

☐ 3. Your enrollment has been approved as requested with the following exceptions:

☐ 4. To maintain enrollment in the QM Extension Course Program you must:

☐ a. Complete successfully the subcourse you have requested within months.

☐ b. Complete successfully credit hours of instruction for enrollment year.

☐ 5. Please return at once all texts and reference material now in your possession. Your enrollment has been cancelled:

☐ a. For failure to meet requirement stated in paragraph 4a or 4b above.

☐ b. At your request

☐ c. Because of successful completion of specific subcourse(s) for which enrolled.

☐ d. For

☐ 6. To reenroll, it will be necessary to submit inclosed application through channels to this School.

☐ a. Upon reenrollment, full credit will be allowed for the above-mentioned subcourse if satisfactory rating was attained, if reenrollment is within one year, and if subcourse has not been revised.

☐ b. If you reenroll, credit will not be allowed since this subcourse is obsolete.

7. Remarks:

FOR THE COMMANDANT:

Mary J Lansing
Major, QMC
Assistant Adjutant

QMCEN FL 5098 (R1)
23 Oct 62
Army-Fort Lee, Va.-2789-63-32M T10-13

To expedite replies to your correspondence please print or typewrite your name and indicate the course in which you are enrolled, when writing to this office.

Virginia State College

Petersburg Virginia

The Virginia State College
upon the recommendation of the Faculty has conferred upon

Samuel Leroy Brown

the degree of

Bachelor of Science

with all the honors, rights and privileges appertaining thereto.

In Witness Whereof, under the Seal of the College, the signatures of duly authorized officers are hereunto affixed, this first day of June, 1964.

Mosby G. Perrow Jr.
President of the State Board of Education

Woodrow W. Wilkerson
Secretary of the State Board of Education

Albert T. Harris
Director

Robert P. Daniel
President of the College

SEDFRE

BURRIS, ROYAN et.al. VS. BENNETT, MARION, S NEW ORLEANS, LOUISIANA 1965

Box 34
Folder 33

State Historical Society Of Wisconsin

Please Retain Original Order

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

ROYAN BURRIS, ROBERT HICKS
and VALEIRA P. HICKS,

Plaintiffs

vs.

MRS. MARION S. BENNETT
D/B/A REDWOOD CAFE,

Defendant

15475

CIVIL ACTION NO.

DIVISION B

* *

COMPLAINT

1. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. section 1343 (3) and section 1342 (4). This is a suit in equity authorized by and instituted pursuant to Title II of the Act known as"the Civil Rights Act of 1964," 78 Stat. 243, and Title 42 U.S.C. section 1983. The jurisdiction of this Court is invoked to secure protection of civil rights and to redress deprivation of rights, privileges, and immunities secured by (a) the Fourteenth Amendment of the Constitution of the United States, Section 1; (b) The Commerce Clause, Article 1, Section 8, Clause 3, of the Constitution of the United States; (c) Title II of the Act known as "The Civil Rights Act of 1964," 78 Stat. 243, providing for injunctive relieve against discrimination in place of public accommodation and (d) Title 42 U.S. C. section 1981, providing for the equal rights of citizens and all persons within the jurisdiction of the United States.

2. Plaintiffs bring this action on their own behalf and on behalf of others similarly situated pursuant to Rule 23 (a) (3) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting the rights of other Negro persons to use the goods, services, facilities, privileges, advantages and accommodations of the Redwood Cafe without discrimination and segregation on the ground of race or color who are so numerous as

to make it impracticable to bring them all before this Court. A common relief is sought. The interests of said class are adequately represented by plaintiffs.

3. This is a proceeding for an injunction restraining defendant from continuing or maintaining any policy, practice, custom and usage of withholding, denying, attempting to withhold or deny, or depriving or attempting to deprive, or otherwise interfering, with the rights of plaintiffs and others similarly situated to admission to and full use and enjoyment of the goods, service, facilities, privileges, advantages, and accommodations of the Redwood Cafe without discrimination and segregation on the ground of race or color.

4. Plaintiffs, Royan Burris, Robert Hicks and Valeira P. Hicks are Negro citizens of the United States and the State of Louisiana residing in the City of Bogalusa.

5. Defendant, Mrs. Marion S. Bennett is the sole proprietor of the business known as Redwood Cafe, which business is located in the Hotel Redwood on 213 Alabama Avenue, Bogalusa, Louisiana.

6. A. The Hotel Redwood provides lodging to transient guests and contains more than five rooms for rent or hire. The operations of the Hotel Redwood affects travel, trade, traffic, commerce, transportation or communication among, between, and through the several states, the District of Columbia or foreign countries, territories and possessions.

B. The Redwood Cafe is physically located within the premises of the Hotel Redwood and holds itself out as serving patrons of said Hotel. The operations of said Restaurant affect travel, trade, traffic, commerce, transportation or communications among, between and through the several states, the District of Columbia or foreign countries, territories and possessions. A substantial portion of the good it serves passes in interstate commerce.

7. On the 14th day of February 1965 Royan Burris accompanied by two other Negroes, Mr. and Mrs. Robert Hicks entered the Hotel Redwood, 213 Alabama Avenue, Bogalusa, Louisiana and went to the restaurant located therein sat at a table and attempted to get

service. The waitress upon seeing them went to the rear of the restaurant and a white lady who wore a blue dress and who appeared to be the manager of the restaurant told them there was a table in the rear if they wished to be served. Mr. Burris told her his party had no intention of going to the kitchen. The lady in the blue dress told the Negroes she could not offer them any protection and when asked if she would serve them told the Negroes, no she would not serve them. She was thanked for her information and the Negroes left.

8. Plaintiffs were denied and deprived of service at the Redwood Cafe because of defendant's well-established and maintained policy, practice, custom and usage of refusing to serve, and discriminating against Negroes in violation of plaintiff's rights to full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of places of public accommodation without discrimination and segregation on the ground of race or color as secured by (a) the Fourteenth Amendment of the Constitution of the United States; (b) the Commerce Clause, Article 1 section 8, Cl. 3, of the Constitution of the United States; (c) Title II of the Act Known as "The Civil Rights Act of 1964" 78 Stat. 243, providing for injunctive relief against discrimination in places of public accommodation; and (d) Title 42 U.S.C. section 1981.

9. Discrimination and segregation at the Redwood Cafe is supported by action of the State of Louisiana within the meaning of the Fourteenth Amendment to the Constitution of the United States and Title II of the Act known as"the Civil Rights Act of 1964." 78 Stat. 243. Said discrimination and segregation is carried on under color of state law and under color of custom and usage required and enforced by officials of the State of Louisiana and political subdivisions thereof.

WHEREFORE COMPLAINANTS PRAY:

I. This Honorable Court issue a temporary restraining order without notice enjoining defendant and all of its agents and employees from refusing service to Negroes in the Redwood Cafe solely on the basis of race.

II. That the court advance this complaint on the docket and order a speedy hearing thereof according to law and that upon such a hearing the court enter a temporary injunction enjoining defendant and all of its agents and employees from refusing service to Negroes in The Redwood Cafe solely on the basis of race.

III. That the court upon final hearing of this cause enter a permanent injunction, enjoining defendant and all of its agents and employees from refusing service to Negroes in the Redwood Cafe solely on the basis of race.

IV. That this Honorable Court allow complainants their costs and attorney fees and such other and further relief as may appear just and proper.

ATTORNEYS FOR COMPLAINANTS
ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE
2211 DRYADES STREET
NEW ORLEANS, LOUISIANA
523-5197

BY: Nils R Douglas

OF COUNSEL:

CARL RACHLIN

38 PARK ROW

NEW YORK 38, NEW YORK

PLEASE SERVE:

MRS. MARION S. BENNETT
D/B/A REDWOOD CAFE
AT: 213-15 Alabama Avenue
Bogalusa, Louisiana

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

ROYAN BURRIS

who being duly sworn did depose and say that he is one of the petitioner in the above and foregoing complaint, that he has read the complaint and that all of the allegations of fact contained therein are true and correct.

Royan Burris
ROYAN BURRIS

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 29th DAY
OF MARCH, 1965.

Nils R Douglas
NOTARY PUBLIC

PLEASE SERVE:

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority personally came and appeared: MR. ROYAN BURRIS who after first being duly sworn did depose and say that on the 14th day of February 1965 the following events occurred:

He and two other Negroes Mr. & Mrs. Robert Hicks at about 8:20 P.M. entered the Hotel Redwood, 213 Alabama Avenue, Bogalusa, Louisiana and went into the restaurant located therein and sat at a table. The waitress upon seeing the Negroes went to the rear and a lady (white) appeared in a blue dress who told us that she had a table and chairs in the back, if you wish to be served. Mr. Burris replied that he did not wish to go to the table in back and had no intention of going in your kitchen. We only want to get three shrimp sandwiches. At this point the lady said I can't serve you Burris asked, why? The lady answered I can't offer you any protection. Burris/then asked, then you won't serve us and the lady [illegible] I won't serve you. Burris then said thank you and all three Negroes left.

Royan Burris

ROYAN BURRIS

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 29TH DAY
OF MARCH, 1965.

Nils R Douglas

NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

ROYAN BURRIS, ROBERT HICKS
and VALEIRA P. HICKS,

Plaintiffs

vs. CIVIL ACTION NO.

MRS. MARION S. BENNETT
D/B/A REDWOOD CAFE,

Defendant

* *

TO THE HONORABLE THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION:

Whereas in the above named cause it has been made to appear by the verified complaint filed herein which was on the 7th day of April, 1965, presented to the Honorable

Judge of the United Stated District Court for the Eastern District of Louisiana, that a temporary restraining order preliminary to hearing upon Motion for a Preliminary injunction should issue, without notice, because immediate irreparable injury, loss and damage will result to the plaintiffs before notice can be served and a hearing had thereon.

Whereas defendant, its agents and employees are engaging unlawfully in discriminatory segregation practices in violation of the constitution and laws of the United States.

Whereas no injury can be caused defendant by such order now, therefore, on Motion of complainants It is ordered that the defendant, Mrs. Marion S. Bennett, D/B/A/ as Redwood Cafe, its agents and employees and those in active concert with them who receive actual notice of this order by personal service or otherwise be and they are hereby enjoined from enforcing a policy of exclusion of Negroes from their restaurant facilities solely because of race.

This restraining order issued at o'clock .M. this day of , 1965.

UNITED STATES JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

ROYAN BURRIS, ROBERT HICKS
and VALEIRA P. HICKS,

Plaintiffs

vs. CIVIL ACTION NO.

MRS. MARION S. BENNETT
D/B/A REDWOOD CAFE,

Defendant

* *

TO THE HONORABLE, THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION:

Comes now, through undersigned counsel, Royan Burris, Robert Hicks and Valeria P. Hicks complainants herein and respectfully moves this Honorable Court for the issuance of a preliminary injunction enjoining defendant and all of her employees and agents and persons actively in concert with them who receive actual notice hereof by personal service or otherwise, be and they are hereby enjoined from enforcing a policy of exclusion of Negroes from their restaurant facilities solely because of race.

ATTORNEYS FOR COMPLAINANTS
ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE
2211 DRYADES STREET
NEW ORLEANS, LOUISIANA
523-5197

BY: ____________________

OF COUNSEL:
CARL RACHLIN
38 PARK ROW
NEW YORK 38, NEW YORK

Historical Society Of Wisconsin

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Box 37
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File

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1966

CADDO PARISH SCHOOL BOARD, ET AL., PETITIONERS
v.
UNITED STATES OF AMERICA, RESPONDENT

THE BOSSIER PARISH SCHOOL BOARD, ET AL., PETITIONERS
v.
UNITED STATES OF AMERICA, RESPONDENT

JACKSON PARISH SCHOOL BOARD, ET AL., PETITIONERS
v.
MARGARET M. JOHNSON, ET AL., RESPONDENTS

CLAIBORNE PARISH SCHOOL BOARD, ET AL., PETITIONERS
v.
YVORNIA DECAROL BANKS, ET AL., RESPONDENTS

MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO APPLICATION FOR STAY

STATEMENT

Three of these school desegregation cases were commenced during the 1964-1965 school year, and the fourth was commenced shortly before the opening of the 1965-1966 school year.[1] At that time the school systems involved were organized and operated on the basis of racial segregation, notwithstanding the mandate of this Court ten years earlier in Brown v. Board of Education, 347 U.S. 483; 349 U.S. 294. The district court ordered the school boards to submit desegregation plans, and the plans submitted were thereafter approved by that court.

These approved plans, however, were constitutionally inadequate because they did not commit the school boards to take meaningful steps to disestablish the traditional dual system based on race. While Negro school children were permitted to apply for admission to formally white schools, the school boards could reject that choice if space was available in a "comparable" school closer to the student's home. No true freedom of choice was given. The approved plans, moreover, made no provision for faculty desegregation, for the elimination of gross inequalities in facilities and programs in the schools traditionally maintained for Negroes, or for transforming the school bus transportation systems into a unitary system not based on race. And there was no assurance that schools would not be constructed in such a manner as to perpetuate the dual system. Accordingly, the judgments of the district court approving these plans were appealed.

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[1] The United States is not a party in the East Baton Rouge and City of Monroe cases.

In April 1966, the United States, which had intervened under Title IX of the Civil Rights Act of 1964, moved to consolidate these cases with three cases initiated in the Northern District of Alabama, and moved for expedited consideration; and on April 7, 1966, the Court of Appeals for the Fifth Circuit, by direction of Judge Rives, set the cases for argument during the week of May 23, 1966. On April 21, 1966, the court requested supplemental briefs as to whether it was permissible or desirable for the court to give weight to the school desegregation guidelines of the Department of Health, Education, and Welfare, and, if so, what methods should be followed in making those guidelines judicially effective. The cases were argued before a three-judge panel of the court of appeals during the course of two days in May 1966. It entered its judgment on December 29, 1966, holding (District Judge Cox dissenting) that the desegregation plans approved by the district courts were constitutionally inadequate and remanding the cases for entry of a specific decree appended to the court's opinion.

On January 27, 1967, the school boards petitioned for a rehearing _en banc_. The petition was granted on February 9, and oral argument was set for March 10. All parties submitted further briefs and on March 10th the twelve judges of the Court of Appeals heard full argument. Further briefs were thereafter submitted by the school boards. On March 29, 1967, the court, in a per curiam opinion, adopted the panel opinion and decree of December 29, 1966, subject to clarifying statements and to minor changes in the decree. Eight of the twelve judges joined the per curiam opinion. Judges Gewin and Bell wrote dissents, but agreed that the judgments below should be reversed. Judge Godbold recorded his dissent, and indicated he would file a dissenting opinion at a later time. Judge Coleman wrote a separate opinion concurring in the judgment of reversal and setting forth his own views.

The decree that was formulated and adopted by the court of appeals was to be applied to the school boards throughout the circuit in cases involving plans based on a freedom-of-choice method of student assignment, although the right was reserved for any of the parties to show that exceptional circumstances warranted modification of the decree. Essentially the decree requires the elimination of the dual school system based on race and establishes minimum standards for freedom-of-choice desegregation plans. Section I of the decree provides that all grades must be desegregated commencing with the 1967-68 school year. Section II sets forth the mechanics for conducting a choice period, including provisions with respect to public distribution of choice forms, the period for exercising choice, and the non-racial assignment of children who fail to exercise a choice. Section III provides that students newly entering the school system are to have a free choice, and Section IV makes provision for transfers in special cases. Section V prohibits racial discrimination in services, facilities, activities and programs of the school system, and Section VI obliges the school boards to equalize the schools traditionally maintained for Negroes. The decree also contains provisions respecting school transportation (Section II), school construction (Section VII), and faculty assignments (Section VIII), all of which are aimed at disestablishing the dual school system based on race. Finally, provision is made for submitting reports to the district courts to enable the courts and the parties to determine whether the obligations under the decree are being performed.

The opinion and decree of the court of appeals *en banc* was issued on March 29, 1967, with a direction that the mandate issue forthwith. On April 10, 1967, the full court of appeals (Judges Gewin and Bell dissenting[2]) denied the motion of the school boards to recall the mandate. The Louisiana school boards now seek a stay from this Court. We oppose their application.

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[2] They would have granted a five-day stay to allow time for the filing of a petition for certiorari.

ARGUMENT

The challenged decisions come here after the fullest consideration by the entire bench of a court which has unusual experience in implementing this Court's mandate in Brown v. Board of Education. These decisions attempt to forestall further delay in the realization of a constitutional right announced thirteen years ago. Recognizing the importance of avoiding yet another year's postponement, the court below took the extraordinary step of providing that its mandate should issue forthwith, and has since denied a motion to recall that mandate. In these circumstances, the applicants bear a very heavy burden to justify a stay by this Court. We submit that the complaining school boards -- who have not yet submitted a petition for certiorari and have given no indication when they will do so -- have failed to meet that burden.

1. Failure to stay the mandate at the court of appeals has only one effect -- the school boards will be required to implement the decree formulated and adopted by the court of appeals according to the time schedule established by that court. It is incumbent upon the applicants to show how this requirement will inflict irreparable harm. We believe they have not made and are unable to make such a showing. They complain of certain mechanics of the freedom-of-choice plan established in the decree -- such as the time of the choice period and the requirement of mailing choice forms. Plainly, the implementation of such

administrative procedures this May would not cause irreparable injury of a magnitude sufficient to warrant a stay. Other objections by the school boards -- such as those relating to the construction and faculty provisions -- misconstrue the nature of the decree; the decree requires the school boards to make a meaningful start toward the disestablishment of the dual system,[3] and it is difficult to understand

---

[3] As to construction, the decree provides:

> The defendants, to the extent consistent with the proper operation of the school system as a whole, shall locate any new school and substantially expand any existing schools with the objective or eradicating the vestiges of the dual system.

As to faculty, the decree provides:

> (a) Faculty Employment. Race or color shall not be a factor in the hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff members, including student teachers, except that race may be taken into account for the purpose of counteracting or correcting the effect of the segregated assignment of faculty and staff in the dual system. Teachers, principals, and staff members shall be assigned to schools so that the faculty and staff is not composed exclusively of members of one race. Wherever possible, teachers shall be assigned so that more than one teacher of the minority race (white or Negro) shall be on a desegregated faculty. Defendants shall take positive and affirmative steps to accomplish the desegregation of their school faculties and to achieve substantial desegregation of faculties in as many of the schools as possible for the 1967-68 school year notwithstanding that teacher contracts for the 1967-68 or 1968-69 school years may have already been signed and approved. The tenure of teachers in the system shall not be used as an excuse for failure to comply with this provision. The defendants shall establish as an objective

(continued on following page)

how such action would cause irreparable harm to the school systems. The fact is that most school systems in the South are voluntarily desegregating this very year under the provisions of the 1966 HEW Guidelines which are essentially similar to the provisions of this decree.

3/ (continued from preceding page)

that the pattern of teacher assignment to any particular school not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school.

(b) Dismissals. Teachers and other professional staff members may not be discriminatorily assigned, dismissed, demoted, or passed over for retention, promotion, or rehiring, on the ground of race or color. In any instances where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system shall be filled through recruitment from outside the system unless no such displaced staff member is qualified to fill the vacancy. If, as a result of desegregation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system shall be evaluated in selecting the staff member to be released without consideration of race or color. A report containing any such proposed dismissals, and the reasons therefor, shall be filed with the Clerk of the Court, serving copies upon opposing counsel, within five (5) days after such dismissal, demotion, etc., as proposed.

(c) Past Assignments. The defendants shall take steps to assign and reassign teachers and other professional staff members to eliminate the effects of the dual school system.

2. A stay in this case could effectively postpone -- to yet another year -- significant progress in public school desegregation throughout the Fifth Circuit.

a. Important school planning must be done during the preceding Spring in order to insure the orderly opening of schools in the Fall, particularly with respect to the assignment of students, the hiring and assignment of faculty members, and the allocation of classroom space. That is why the decree calls for a choice period in May -- while the students are still in school -- during which all students in the school system are to exercise their choice of schools and the school boards can plan for that enrollment for the coming school year. And in order to have a meaningful choice period it is necessary to precede it with at least a week of public notice. (Section II(e) of the decree). Thus, initial implementation of the decree is scheduled to take place within one week from this coming Monday.

b. A stay in these cases will unquestionably have the effect of staying the progress of desegregation in cases other than those immediately before this Court. The district courts in the Fifth Circuit deferred action in numerous school desegregation cases pending disposition of the instant litigation.[4] Following entry of the *en banc* decision, district courts in the circuit proceeded promptly to provide a remedy in keeping with that decreed by the court below.[5] If this Court grants a stay in the instant cases, many federal district courts throughout the Fifth Circuit will doubtless postpone further action in school desegregation cases during the period of the stay.

---

[4] See e.g., *United States* v. *Wilcox County Board of Education*, S.D. Ala., Civ. Action No. 3934-65, August 23, 1966; *Boyd* v. *Pointe Coupee Parish School Board*, E.D. La., Civ. Action No. 3164, June 14, 1966; *Dunn* v. *Livingston Parish School Board*, E.D. La., Civ. Action No. 3197, June 14, 1966; *Williams* v. *Iberville Parish School Board*, E.D. La., Civ. Action No. 2921, June 14, 1966; *Charles* v. *Ascension Parish School Board*, E.D. La., Civ. Action No. 3257, June 14, 1966; *United States* v. *La Salle Parish School Board*, W.D. La., Civ. Action No. 12178, August 26, 1966.

[5] For example, the school boards state in their application for a stay ". . . District Courts in the State of Louisiana are already applying this decree to other school boards not parties to this action."

3. There is, in any event, no substantial question presented by the application for a stay. The court essentially held "that boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools -- just schools." That statement of the constitutional obligation of the school boards is, we believe, clearly correct. The decree is a necessary and proper exercise of the court's equity powers to implement that mandate.

a. The twelve years of litigation following Brown have primarily focused on one narrow task -- the elimination of the use of dual attendance zones for assigning students to schools. Because of widespread resistance, the courts have been primarily concerned with securing the right of individual Negroes to attend schools reserved exclusively for whites and the full scope of the duty imposed on the school authorities by Brown has been obscured. The focus is now shifting to the other tasks required to transform a system organized on the basis of racial separatism into a unitary, non-racial system. The defense interposed by the applicants is essentially this: "We are willing to let Negro students into white schools, if they want to come, but that is all we may be required to do." This response fails to recognize that racial discrimination consists not only of excluding Negroes from the white schools, but in maintaining separate schools which the State differentiates on a racial basis. The maintenance of schools for Negroes, upon the basis of their race, is itself a discrimination against the Negroes of the community, as a group and as individuals. Indeed, such a system discriminates against even the Negro attending a traditionally white school by implying the inferiority of his race.

Thus, we submit the court below was plainly correct in holding that no desegregation plan is constitutionally adequate unless it provides for the reorganization of dual school systems. The logic of the Brown decision obviously requires no less. This case therefore turns on the reasonableness of the particular remedial measures adopted by the court below after its painstakingly thorough consideration.

To begin with, the court below directed that certain basic steps be taken in order to permit freedom of choice to be made in a manner and in a context that will contribute to the creation of a truly non-racial school system. See Goss v. Board of Education, 373 U.S. 683 (1963). Certain of the provisions of the decree relate to procedures for extending and exercising the choice, *e.g.*, notice requirements, the method of indicating a choice, and the process of enrollment following the choice. These mechanics are simply designed to insure that the choise is extended to all, and that students are actually assigned to schools on the basis of their choice. Other provisions guard against interference with the exercise of the choice, e.g., the provision enjoining school officials from influencing students to go to the schools to which they were previously assigned under the dual zone system, or from denying school transportation to students choosing to go to a school attended by members of the opposite race.

Finally, the decree contains provisions relating to faculty desegregation and school construction. The requirement respecting the assignment of faculty is in keeping with the decisions of all of the other circuits, which, following this Court's decision in Bradley v. School Board of Richmond, 382 U.S. 103 and Rogers v. Paul, 382 U.S. 198, have uniformly held school boards obliged to disestablish segregated patterns attributable to the racial allocation of faculty under the dual system. See e.g., Clark v. Board of Education of Little Rock School District, No. 18368 (C.A. 8, decided December 16, 1966, rehearing denied March 31, 1967); Board of Education of Oklahoma City Public Schools v. Dowell, No. 8523 (C.A. 10, decided January 23, 1967), affirming 244 F. Supp. 971 (W.D. Okla.); Wheeler v. City of Durham Board of Education, 363 F. 2d 738 (C.A. 4).

b. In formulating the proposed decree, the court looked not only to its previous decisions and the decisions of other courts, but also to the HEW guidelines. This is wholly in accord with earlier decisions of the Fifth Circuit, Singleton v. Jackson Municipal Separate School District, 348 F. 2d 729 (1965); Singleton v. Jackson Municipal Separate School District, 355 F. 2d 865 (1966); Price v. Denison Independent School District, 5 Cir. 1965, 348 F. 2d 1010 (1965); Davis v. Board of School Commissioners of Mobile County, 5 Cir. 1966, 364 F. 2d 896, and of other circuits. See e.g., Kemp v. Beasley, 352 F. 2d 14 (8 Cir. 1965); Smith v. Board of Education of Morrilton, 365 F. 2d 770 (8 Cir. 1966); Cypress v. Newport News General and Non-sectarian Hospital Association, No. 10672 (C.A. 4, en banc decided March 9, 1967) (according "great weight" to HEW hospital guidelines); see also the district court's decision in Kier v. County Board of Augusta County, 249 F. Supp. 239 (W.D. Va., 1966); Wright v. County School Board of Greenville County, 252 F. Supp. 378 (E.D. Va., 1966). It raises no question of substance. The court stressed that its responsibility was to establish constitutional standards and that it was in no way "bound" by the HEW guidelines; but it also recognized that in formulating such standards it could draw on the administrative experience and expertise of the United States Office of Education, which had been developed by the agency in discharging its obligations under Title VI of the Civil Rights Act of 1964.[6]

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[6] In a telegram (dated April 12, 1967) to this Court by the attorney for the Louisiana School Boards Association and the East Baton Rouge Parish School Board, it is claimed that the decision below is "in conflict with many decisions of other circuits", "particularly" with the decision of the Eighth Circuit in Clark v. School Board of City of Little Rock, 369 F.2d 661 (1966), rehearing unanimously denied March 31, 1967. But that claim is without any basis. The Clark case itself approved a desegregation plan that is in all essential respects similar to the Fifth Circuit decree in these cases. The sole significant difference is that free choice was made mandatory by that Court only in the so-called transitional grades (1, 7, 9), and this is only one administrative facet of a free choice plan that was based on the different facts in the Eighth Circuit. The Court made this abundantly clear in its March 31, 1967 opinion unanimously denying rehearing (p. 4):

> The breadth and depth of the segregation problem varies in different states and in different parts of the same state. Therefore, we can have no quarrel with the Fifth Circuit's 2-to-1 decision in United States v. Jefferson County Board of Education. If the majority of the judges, in Jefferson County, believe the H.E.W. Guidelines are the minimum necessary to meet the constitutional mandate of a 'unitary, non-racial system' in their Circuit, we feel that is a matter for their sole consideration. As problems vary in different parts of the country, of necessity the courts' orders to effectuate a common goal will also be varied. The Fifth Circuit has borne the brunt of the school desegregation cases and its judgment merits our respect and admiration for their devotion to this admittedly difficult task. However, our factual situation is not the same as theirs. Jefferson County is still dealing with dual attendance zones. We are not. A much greater degree of integration has been achieved in Arkansas than in the States directly concerned in the Jefferson County decision. We don't think we should flatly condemn a freedom of choice plan, as proposed by the Board, which does give an annual freedom of choice to laterally transfer schools to each student, subject only to conditions of overcrowding. We feel the plan should be given an opportunity to work.

c. The desirability of a uniform circuit-wide approach to remedial problems is a judgment that is peculiarly within the province of the circuit court, which is faced with the day-to-day problems of judicial administration arising out of more than a decade of implementing this Court's mandate in Brown. As the court of appeals said (pp. 35-36 of the panel decision):

> The first school case to reach this Court after Brown v. Board of Education was Brown v. Rippey, 5 Cir. 1956, 237 F. 796. Since then we have reviewed 41 other school cases, many more than once. The district courts in this circuit have considered 128 school cases in the same period. Reviewing these cases imposes a taxing, time-consuming burden on the courts not reflected in statistics. An analysis of the cases shows a wide lack of uniformity in areas where there is no good reason for variations in the schedule and manner of desegregation. In some cases there has been a substantial time lag between this Court's opinions and their application by the district courts. In certain cases -- which we consider unnecessary to cite -- there has even been a manifest variance between this Court's decision and a later district court decision. A number of district courts still mistakenly assume that transfers under Pupil Placement Laws -- superimposed on unconstitutional initial assignment -- satisfy the requirements of a desegregation plan. The lack of clear and uniform standards to govern school boards has tended to put a premium on delaying actions. In sum, the lack of uniform standards has retarded the development of local responsibility for the administration of schools without regard to race or color. (Footnotes omitted.)

CONCLUSION

Any further delay in these cases would be inconsistent with this Court's directive of last Term: "Delays in desegregating school systems are no longer tolerable." Bradley v. School Board of City of Richmond, 382 U.S. 193, 195. See, also, Griffin v. School Board, 377 U.S. 219, 229; Goss v. Board of Education, 373 U.S. 683, 689; Calhoun v. Latimer, 377 U.S. 263, 264-265; Watson v. City of Memphis, 373 U.S. 526; Meredith v. Fair, 83 S. Ct. 10 (per Justice Black). In no school desegregation suit, to our knowledge, has this Court found it necessary to grant a stay of an order requiring desegregation. See, e.g., Ennis v. Evans, 364 U.S. 802 (1960); Houston Independent School District v. Ross, 364 U.S. 803; and see Lucy v. Adams, 350 U.S. 1; Cooper v. Aaron, 358 U.S. 27; Danner v. Holmes; 364 U.S. 939; Board of Education of the City School District of the City of New Rochelle v. Taylor, 82 Sup. Ct. 10 (per Mr. Justice Brennan). It is no more appropriate here. The issues have been adjudicated with extraordinary care by a court which has special competence in the task of judicial administration involved and the conclusions which it has reached are manifestly correct. The United States, therefore, respectfully submits that this application for a stay be denied.

THURGOOD MARSHALL
Solicitor General

JOHN DOAR
Assistant Attorney General

April 13, 1967

IN THE

UNITED STATES

COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant
vs. No. 23,274
CADDO PARISH SCHOOL BOARD,
ET AL.,
Appellees

* * * * * * * *

UNITED STATES OF AMERICA,
Appellant
vs. No. 23,365
THE BOSSIER PARISH SCHOOL
BOARD, ET AL.,
Appellees

* * * * * * * *

MARGARET M. JOHNSON, ET AL.,
Appellants
vs. No. 23,173
JACKSON PARISH SCHOOL BOARD,
ET AL.,
Appellees

* * * * * * * *

YVORNIA DECAROL BANKS, ET AL.,
Appellants
vs. No. 23,192
CLAIBORNE PARISH SCHOOL BOARD,
ET AL.,
Appellees

* * * * * * * *

Appeals from the United States District Court
for the Western District of Louisiana

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SUPPLEMENTAL BRIEF ON REHEARING

* * * * * * * *

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I N D E X

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THE COURT ERRED IN FINDING THAT MANDATORY RACIAL MIXING IS A CONSTITUTIONAL REQUIREMENT 3

THE MAJORITY OPINION PROVIDING DIFFERENT RULES FOR APPELLANTS, AS OPPOSED TO THOSE IN THE REST OF THE COUNTRY, IS UNSUPPORTED IN LAW OR JURISPRUDENCE ------------------------------ 12

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IN THE UNITED STATES OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, Appellant vs CADDO PARISH SCHOOL BOARD, ET AL., Appellees	No. 23,274
UNITED STATES OF AMERICA, Appellant vs THE BOSSIER PARISH SCHOOL BOARD, ET AL., Appellees	No. 23,365
MARGARET M. JOHNSON, ET AL., Appellant vs JACKSON PARISH SCHOOL BOARD, ET AL., Appellees	No. 23,173
YVORNIA DECAROL BANKS, ET AL., Appellant vs CLAIBORNE PARISH SCHOOL BOARD, ET AL., Appellees	No. 23,192

Appeals from the United States District Court
for the Western District of Louisiana

PREFACE

In order to properly evaluate the legal arguments and relation to the factual situation presented in these cases st first examine the type of plans at issue herein.

Basically, with minor variations, each school system dopted a freedom of choice plan. A plan of this type res that each student choose the school which he wishes to d. This choice is not based on former racial composition e school, either the one previously attended or the one n.

Most of the students in each system have already made choice and in September of 1967 every student will have the choice.

Such a system completely eliminates the vice (if it e) of "de facto segregation"[1] created by the neighborhood l system and completely and without question terminates

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or the basis of the argument the Court's definition will ed.

. . .that is, racial imbalance resulting fortuitously in ol system based on a single neighborhood school serving hite and Negro children in a certain attendance area or borhood." (Jefferson p. 19)

* * * * * *

e, however,:

he use of the terminology 'de facto segregation' is both ically and logically incorrect. The term 'de facto segre-' is popularly used to indicate the common situation where is separation of the races on a basis other than race. gation' is a legal conclusion which denotes unconstitution- Therefore, calling separation of the races in the schools purely fortuitous reasons 'de facto segregation' assumes the sion as to the legal validity of this problem. 'The term de segregation makes the racially imbalanced school appear. . . the Northern counterpart of segregated education under the w laws. . .(A)s such, the term distorts reality and paralysis .' Fiss, Racial Imbalance In the Public Schools: The Con- onal Concepts, 78 Harv. L.Rev. 564,566 (1965). As a more e term, racial imbalance will be used in this note to denote ous racial separation in the public schools.

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any state compulsion, the basis

I.

THE COURT ERRED IN FINDIN MIXING IS A CONSTITUTIO

Previous briefs have exha prudence, showing conclusively tha only a termination of a state ope not a form of racial balancing. the contrary[3], mandatory placemen contrary to opinions of this Cour

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2. "The other means of abolishing away with zones completely. Fron mate objective of eliminating the seems the obvious equivalent of r far easier of accomplishment wher mate operation to be founded upon Bradley v. School Board of City o

3. "Manifestly, the duty to dese the mere 'admission' of Negro stu As for 'intergration' manifestly clude some arrangement for the at white schools."

"As we see it, the law impose that is, disestablish segregation grate, in the sense that a dispro Negroes in certain schools cannot students is a high priority educa

4. Borders v. Rippy, 247 F.2d 2 Rippy, 285 F. 2d 43, 48 (5th Cir. Independent School District, 241 Stell v. Savannah-Chatham County 55, 59 (5th Cir. 1964); Evers v. District, 328 F. 2d 408, 410 (5th of Education of City of Birmingha Lockett v. Board of Education, 34 and United States v. Wilcox Count 769, 770 (5th Cir. 1966).

(See Page 4 for Foot

any state compulsion, the basis of "de jure" segregation.[2]

I.

THE COURT ERRED IN FINDING THAT MANDATORY RACIAL MIXING IS A CONSTITUTIONAL REQUIREMENT

Previous briefs have exhaustively discussed the jurisprudence, showing conclusively that the constitution requires only a termination of a state operated dual school system, and not a form of racial balancing. Despite the Court's opinion to the contrary[3], mandatory placement, to achieve racial mixing, is contrary to opinions of this Court,[4] other circuits[5] and

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[2] "The other means of abolishing the dual zone system was to do away with zones completely. From the point of view of the ultimate objective of eliminating the illegal dual zoning, dezoning seems the obvious equivalent of rezoning and, administratively, far easier of accomplishment when the School Board intends ultimate operation to be founded upon the free choice of the pupils." Bradley v. School Board of City of Richmond, 345 F. 2d 310, 319.

[3] "Manifestly, the duty to desegregate schools extends beyond the mere 'admission' of Negro students on a non-racial basis. As for 'intergration' manifestly a desegregation plan must include some arrangement for the attendance of Negroes in formerly white schools."

"As we see it, the law imposes an absolute duty to desegregate, that is, disestablish segregation. And an absolute duty to integrate, in the sense that a disproportionate concentration of Negroes in certain schools cannot be ignored; racial mixing of students is a high priority educational goal."

[4] Borders v. Rippy, 247 F.2d 268,271(5th Cir. 1957); Boson v. Rippy, 285 F. 2d 43, 48 (5th Cir. 1960); Avery v. Wichita Falls Independent School District, 241 F. 2d 230, 233 (5th Cir. 1956); Stell v. Savannah-Chatham County Board of Education, 333, F. 2d 55, 59 (5th Cir. 1964); Evers v. Jackson Municipal Separate School District, 328 F. 2d 408, 410 (5th Cir. 1964); Armstrong v. Board of Education of City of Birmingham, 323 F. 2d 333, (5th Cir. 1963); Lockett v. Board of Education, 342 F. 2d 225, 228 (5th Cir. 1965); and United States v. Wilcox County Board of Education, 366 F. 2d 769, 770 (5th Cir. 1966).

(See Page 4 for Footnote 5)

upported by decisions of the United States Supreme Court.[6]

In the absence of controlling jurisprudence to support
court's position it sought to find a minimal constitutional
ndards from other sources.[7]

That of the First Circuit in Springfield School Committee v.
ksdale, 348 F. 2d 261, 264 (1st Cir. 1965); that of the Second
cuit in Taylor v. Board of Education of New Rochelle, 294 F.
36 (2nd Cir. 1961); that of the Fourth Circuit in Bradley v.
ool Board of City of Richmond, 345 F. 2d 310, 315-15 (4th
. 1965); Jeffers v. Whitley, 309 F. 2d 621 (1962); that of the
th Circuit in Kelley v. Board of Education of Nashville; 270
2d 209, 226 (6th Cir.), cert. denied, 337 U.S. 924 (1964); and
of the Tenth Circuit in Downs v. Board of Education of Kansas
y, 336 F. 2d 988, 998 (10th Cir. 1964), cert. denied, 380 U.S.
(1965); Clark v. Board of Education of Little Rock, No. 18,360
ghth Circuit, 1966). It is also inconsistent with the substance
the decision of the Third Circuit in Evans v. Ennis, 281 F. 2d
(3rd Cir. 1960).

Including Brown v. Board of Education, 347 U.S.483, (1954);
wn v. Board of Education, 349 U.S. 294 (1955); Cooper v. Aaron,
U.S. 1 (1958); and Goss v. Board of Education of Knoxville,
U.S. 783 (1963).

"Once again the Court is called upon to review school desegre-
ion plans to determine whether the plans meet constitutional
ndards. The distinctive feature of these cases, consolidated
appeal, is that they require us to reexamine school desegregation
ndards in light of the Civil Rights Act of 1964 and the Guide-
es of the United States Office of Education, Department of
lth, Education, and Welfare (HEW)". (Jefferson, p. 3)

"Such deference is consistent with the exercise of traditional
icial powers and functions. HEW Guidelines are based on
isions of this and other courts, are formulated to stay within
scope of the Civil Rights Act of 1964. . ." (Jefferson p. 8)

"But we hold that HEW's standards are substantially the same
this Court's standards. They are required by the Constitution
as we construe them, are within the scope of the Civil Rights
of 1964. In evaluating desegregation plans, district courts
ld make few exceptions to the Guidelines and should carefully
or those so as not to defeat the policies of HEW or the holding
his Court." (Jefferson p. 9)

"We read Title VI as a congressional mandate for change -- in
and method of enforcing desegregation." (Jefferson p. 19)

Neither the language nor
Civil Rights Act of 1964 buttres
the Court. If Congress "speaks
its plain and clear words have e
contrary to that of the Court.

The Basic constitutional
racial separation must be elimin
was legislatively recognized by
Rights Act.

> "Desegregation" means th
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> another in order to achi
> or otherwise enlarge the
> court to insure complian
> standards." Civil Right
> 407 (a) (2))

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8. Jefferson p. 14; see, however
p. 12714.
"Other minor changes include
"public policy of the United Sta
achievement of school desegregat
phrase would be deleted in title

Neither the language nor the legislative history of the Civil Rights Act of 1964 buttress the conclusion reached by the Court. If Congress "speaks as the Voice of the Nation",[8] its plain and clear words have established a national policy contrary to that of the Court.

The Basic constitutional concept that only compulsory racial separation must be eliminated to constitute desegregation was legislatively recognized by Congress in the 1964 Civil Rights Act.

> "Desegregation" means the assignment of students to public schools and within such schools without regard to their race,color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance". Civil Rights Act (Title IV, Section 401(b)).
>
> ". . .provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." Civil Rights Act, 1964 (Section 407 (a) (2))

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[8] Jefferson p. 14;see, however, (110 Congressional Record) p. 12714.

"Other minor changes include deleting the concept of the "public policy of the United States favoring" the orderly achievement of school desegregation,for the same reason the phrase would be deleted in title III; . . ."

though attempts are made to distinguish the court's
om the legislatively prohibited correction of im-
he clear language of the opinion is to the contrary.[9]
of children of each race in a school must reflect the
figures or a plan is subject to constitutional
.[10]

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racial imbalance infects a public school system, there
no way to alleviate it without consideration of race...
o constitutional right to have an inequality perpetu-
fferson p. 71

ustification for the school board's incorporation of
tinctions in its correctional scheme is that race is
characteristic, given the school board's purpose,
o avoid psychological injury to the Negro child,
social barriers, and mitigate the academic inadequacy
alanced schools. Of course, it might be argued that
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ectional steps are not attributable to the race of the
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on the Negro. Moreover, most Negroes in the ghetto, and
nding an imbalanced school, are members of the lowest
lass, and thus the board's remedial measures will tend
e social imbalance as well.' Fiss, Racial Imbalance in
Schools: The Constitutional Concepts, 78 Harv. L. Rev.
8 (1965)." Jefferson, p. 71, note 89.

milar inference may be drawn in school desegregation
n the number of Negroes attending school with white
s manifestly out of line with the ratio of Negro school
o white school children in public schools. Common sense
hat a gross discrepancy between the ratio of Negroes
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inference that the school plan is not working as it
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Such pronouncements fly i
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On June 4, 1964, while re
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> children around a city in
> a certain racial balance
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> Furthermore, a new s
> explicitly declare that '
> title shall prohibit clas
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Such pronouncements fly in the face of not only the statute but also the legislative debate.

On June 4, 1964, while reading to the United States Senate the general understanding of the bill, floor leader, Senator Humphrey stated:

> "Next, changes are made to resolve doubts that have been expressed about the impact of the bill on the problem of correcting alleged racial imbalance in public schools. The version enacted by the House was not intended to permit the Attorney General to bring suits to correct such a situation, and, indeed, said as much in section 401(b). However, to make this doubly clear, two amendments dealing with this matter are proposed.
>
> The first provides that nothing in title IV 'shall empower any court' or official of the United States to issue 'any order' seeking to achieve 'a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.' This addition seeks simply to preclude an inference that the title confers new authority to deal with 'racial imbalance' in schools, and should serve to soothe fears that title IV might be read to empower the Federal Government to order the busing of children around a city in order to achieve a certain racial balance or mix in schools.
>
> Furthermore, a new section 410 would explicitly declare that 'nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.'

Thus, classification along bona fide neighborhood school lines, or for any other legitimate reason which local school boards might see fit to adopt would not be affected by title IV, so long as such classification was bona fide. Furthermore, this amendment makes clear that the only Federal intervention in local schools will be for the purpose of preventing denial of equal protection of the laws. "110 Congressional record, p. 12714.

Not completely satisfied with the explanation the

te went into the school issue quite at length, none of

h supports the majority decision. (110 Congressional

rd, June 4, 1964, pp. 12715-7)

Mr. BYRD of West Virginia. Mr. President, will the Senator yield?

Mr. HUMPHREY. I yield to the Senator from West Virginia.

Mr. BYRD of West Virginia. Can the Senator from Minnesota assure the Senator from West Virginia that under title VI school children may not be bused from one end of the community to another end of the community at the taxpayers' expense to relieve so-called racial imbalance in the schools?

Mr. HUMPHREY. I do.

Mr. BYRD of West Virginia. Will the Senator from Minnesota cite the language in title VI which would give the Senator from West Virginia such assurance?

Mr. HUMPHREY. That language is to be found in another title of the bill, in addition to the assurances to be gained from a careful reading of title VI itself.

Mr. BYRD of West Virginia. In title IV?

Mr. HUMPHREY. In title IV of the bill.

Mr. BYRD of West Virginia. Will the Senator from Minnesota read that language in title IV?

Mr. HUMPHREY. Yes; I would be more than happy to do so.

The provision merely quotes the substance of a recent court decision, which [illegible] and which I desire to in[illegible] the RECORD today, the so-called [illegible]. The language appears on [illegible] of the substitute bill beginning [illegible] line 18. It refers back to matters of desegregation. The language is as follows:

> *Provided*, That nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

Mr. BYRD of West Virginia. What does the word "herein" mean?

Mr. HUMPHREY. It means within the act.

Mr. BYRD of West Virginia. Does it mean the act or the title?

Mr. HUMPHREY. It means the act. If the Senator would like to offer an

amendment, if
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Mr. BYRD of West Virginia. Mr. President, will the Senator yield?

Mr. HUMPHREY. I yield to the Senator from West Virginia.

Mr. BYRD of West Virginia. Can the Senator from Minnesota assure the Senator from West Virginia that under title VI school children may not be bused from one end of the community to another end of the community at the taxpayers' expense to relieve so-called racial imbalance in the schools?

Mr. HUMPHREY. I do.

Mr. BYRD of West Virginia. Will the Senator from Minnesota cite the language in title VI which would give the Senator from West Virginia such assurance?

Mr. HUMPHREY. That language is to be found in another title of the bill, in addition to the assurances to be gained from a careful reading of title VI itself.

Mr. BYRD of West Virginia. In title IV?

Mr. HUMPHREY. In title IV of the bill.

Mr. BYRD of West Virginia. Will the Senator from Minnesota read that language in title IV?

Mr. HUMPHREY. Yes; I would be more than happy to do so.

The provision merely quotes the substance of a recent court decision, which I have with me and which I desire to insert in the Record today, the so-called Gary case. The language appears on page 31 of the substitute bill beginning on line 13. It refers back to matters of desegregation. The language is as follows:

> *Provided*, That nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

Mr. BYRD of West Virginia. What does the word "herein" mean?

Mr. HUMPHREY. It means within the act.

Mr. BYRD of West Virginia. Does it mean the act or the title?

Mr. HUMPHREY. It means the act. If the Senator would like to offer an amendment, if he believes we have not been sufficiently precise, I wish he would do so. As Senator in charge of the bill, I would entertain such an amendment.

Mr. BYRD of West Virginia. But would the Senator from Minnesota also indicate whether the words "provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance" would preclude the Office of Education, under section 602 or title VI, from establishing a requirement that school boards and school districts shall take action to relieve racial imbalance wherever it may be deemed to exist?

Mr. HUMPHREY. Yes. I do not believe in duplicity. I believe that if we include the language in title IV, it must apply throughout the act. However, the courts would hold that if there were gerrymandering of school districts to provide for segregation, the order of the court to declare such gerrymandering unconstitutional would prevail. That is what we call the de facto school segregation problem.

Mr. BYRD of West Virginia. Yes.

Mr. HUMPHREY. As the law in the Federal court now stands, while intentional gerrymandering of school districts to perpetuate segregation has been held to be a violation of the 14th amendment, normal residential zoning resulting in de facto school desegregation will apparently be upheld by the courts. As to racial balancing, Judge Beamer's opinion in the Gary case is significant in this connection. In discussing this case, as we did many times, it was decided to write the thrust of the court's opinion into the proposed substitute. There was quite an argument about it among those of us who tried to prepare the substitute, but the Senators may recall that the Supreme Court refused to grant certiorari in this case. In effect, the ruling of the circuit court has been upheld.

Mr. BYRD of West Virginia. That may be true, but I must give my most careful attention to the proposal which we are studying and which may be enacted by the Congress. I merely wish to make doubly sure that the language is not unclear on the point, and I do not state at this time that I am opposed to the busing of children or that I support the busing of children. There is a great question in the minds of many Senators—and there is a question in my own mind—as to whether the subject, as treated herein, is completely unambiguous.

I agree that the language in title IV should make the point clear, insofar as title IV is concerned. I agree that no court, on the basis of this provision, would be empowered to issue any order seeking to achieve a racial balance in any school. But it does not mean that any agency in the Government could not cut off Federal assistance. The issuance of a court order and the termination of Federal assistance are two different matters. Title VI in section 601 provides:

> SEC. 601. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 602 is for the purpose of implementing the policy laid down in section 601.

Mr. HUMPHREY. Correct.

Mr. BYRD of West Virginia. But in order to implement that policy it is provided in H.R. 7152 that each Federal department and agency, and this includes the Office of Education, which is empowered to extend Federal financial assistance to any program or activity by way of grant, loan, or contract other than a contract of insurance or guarantee, shall take action.

I believe that in the substitute bill the language "is authorized and directed," is used, which means "shall take action," with respect to such program or activity, to effectuate the policy that is enunciated in section 601.

It provides further:

> Such action may be taken or pursuant to rule, regulation, or order—

These words may have been changed in the substitute, which I do not have before me—

> of general applicability.

It provides further:

> After a hearing, compliance with any requirement—

I repeat "any requirement." "Any requirement" means "any requirement"—

> adopted pursuant to this section.

Suppose the Office of Education establishes a regulation that there shall be no racial imbalance in the schools of any district which receives Federal assistance. Cannot the Office of Education, pursuant to carrying out this regulation, deny assistance to school districts wherein racial imbalance exists?

Mr. HUMPHREY. Let me read from the substitute:

> *Provided*, That nothing herein shall empower any official or court of the United States to issue any order.

Mr. BYRD of West Virginia. "To issue any order," but does it provide that the Office of Education shall not cut off Federal assistance?

Mr. HUMPHREY. But in order to cut off Federal assistance, the President would have to issue the order, if the Senator will read section 602.

Mr. BYRD of West Virginia. The words are:

> No such rule, regulation, or order shall become effective unless and until approved by the President.

Mr. HUMPHREY. That is correct.

Mr. BYRD of West Virginia. What assurance does the Senator give me that the President will not approve such a requirement?

Mr. HUMPHREY. Because I do not believe the President will violate the law,

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Mr. HUMPHREY. If the Senator will read all of title VI——

Mr. BYRD of West Virginia. I have, not once, but many times.

Mr. HUMPHREY. The worry is that some bureaucrat may issue an order that would cut off funds to a department or instrumentality or agency of a State or local government or school or some such activity or institution. What did we do to make sure that would not happen? We provided the language:

> No such rule, regulation, or order shall become effective unless and until approved by the President.

Then comes this language:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate—

Like the Appropriations Committee of which the distinguished Senator from West Virginia is a member—

> having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Mr. BYRD of West Virginia. The Appropriations Committee does not have legislative jurisdiction.

Mr. HUMPHREY. It reads "having legislative jurisdiction over the program or activity involved."

The Appropriations Committee has the power of the purse.

Mr. BYRD of West Virginia. That is not legislative jurisdiction. The language reads: "legislative jurisdiction."

Mr. HUMPHREY. That is correct. I say most respectfully that the Appropriations Committee has a way of being able to get into practically every committee activity, because it has the power of the purpose.

I cannot believe the Senator's worries are well grounded. We are willing to listen to the Senator's arguments or his amendment, for I think he would probably secure great support.

Mr. BYRD of West Virginia. Mr President, it is not my purpose to harass the Senator from Minnesota, or to attempt to do so. I simply feel that the language in title VI which reads "any requirement" is not clear and that this language would permit the Office of Education, if it desired to do so, to establish a requirement to correct racial imbalance, whatever that is, and I am not sure anyone knows. Of course, the President could approve that requirement without violating the law; and even though President Johnson might not do so, perhaps some subsequent President would approve such a requirement. If that happened, it seems to me the Office of Education could terminate or refuse to grant assistance to any school district in the country if it did not comply with such requirement. Now, the very able and friendly Senator from Minnesota has referred to the making of legislative history on this point. As to legislative history, I should like to read from People against New York Central R.R. Co., Court of Appeals of New York, 1855—these words:

> If its language—

Referring to a statute—

> is plain and unambiguous, there is no room for construction.

It seems to me that the language "any requirement" is plain and unambiguous.

(At this point Mr. METCALF took the chair as Acting President pro tempore.)

Mr. HUMPHREY. Unless one has a proviso. We are always adding a proviso to something. We can say, "The President of the United States shall do this, provided that he shall not do that." What we have done here is to provide that, "You shall do certain things, provided that," and then we list what cannot be done.

Mr. BYRD of West Virginia. Where is the proviso in title VI which would prohibit the Office of Education from doing what I have just stated it might conceivably do?

Mr. HUMPHREY. There is such a thing as having a statement written into an act that covers the act. One does not have to repeat it in every other paragraph.

Mr. BYRD of West Virginia. Mr. President, there is——

Mr. JAVITS. Mr. President, will the Senator allow me to interject at that point?

Mr. HUMPHREY. I yield.

Mr. JAVITS. I believe I know what the Senator from West Virginia [Mr. BYRD] is asking about. I had a great deal to do with drafting the point we are talking about.

I should like to point out that the operative words of section 602 in title VI are these: "which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance."

I invite the attention of the Senator from West Virginia to page 33, lines 9, 10, and 11 of the amendment in the nature of a substitute.

In short, the only time there can be a cutoff of funds is if the segregation or discrimination is being practiced in respect to a matter which if stopped will still not throw us out in this definition as to the "achievement of the objectives of the statute authorizing the financial assistance."

Taking the case of the schools to which the Senator is referring, and the danger of envisaging the rule or regulation relating to racial imbalance, it is negated expressly in the bill, which would compel racial balance. Therefore, there is no case in which the thrust of the statute under which the money would be given would be directed toward restoring or bringing about a racial balance in the schools. If such a rule were adopted or promulgated by a bureaucrat, and approved by the President, the Senator's State would have an open and shut case under section 603. That is why we have provided for judicial review. The Senator knows as a lawyer that we never can stop anyone from suing, nor stop any Government official from making a fool of himself, or from trying to do something that he has no right to do, except by remedies provided by law. So I believe it is that set of words which is operative.

Let me give the Senator an example, because we discussed the question in great detail. We discussed in great detail the situation in which a contractor on Government work—that is, work in which the United States puts up some of the money. Assume he is a road contractor and was discriminating in his business against hiring Negroes, but he was not discriminating on that particular job.

I state for the RECORD that because he was discriminating generally, but was not discriminating on that job, we could not cut off his funds because the statute which permitted the Federal Government to put up its share of the money did not apply to the contractor's general business operations. It applied only to the construction of the road.

Mr. BYRD of West Virginia. Only where the funds were being applied.

Mr JAVITS. The Senator is correct. If his nose was clean, to use a curbstone phrase, in terms of employment practices on the road job, that is as far as we could go.

(At this point, Mr. BURDICK took the chair as Presiding Officer.)

Mr. BYRD of West Virginia. I thank the Senator from New York for his interpretation of the language. I trust that it will help to clarify the intent of the title. I also thank the Senator from Minnesota for yielding additionally.

In closing, if the Senator from Minnesota will permit me, I should like to read into the RECORD one excerpt from the case of *Woollcott* v. *Shubert* (111 N.E. 829):

> It is established law, however, that the statements and opinions of legislators uttered in the debates are not competent aids to the court in ascertaining the meaning of statutes.

If we are going to talk about legislative history, I believe that we had better not lean too much upon the assurance of the distinguished Senator from Minnesota, which he gave to me in one of the conferences, and which he has reiterated on the floor of the Senate today, that we will, through this debate, establish legislative history to make clear the intent of the statute. I believe that the

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Mr. HUMPHREY. I recognize that the Senator has quoted the citation. I can give him quotations contrary to that one, without fear of contradiction. I am not a lawyer, but I have studied jurisprudence, constitutional law, and case law, and I know of no time when a court of competent jurisdiction has said that statements made by legislators relating to a law are without meaning or that they have no effect upon the interpretation of law or the application of law. To the contrary.

Mr. BYRD of West Virginia. The Senator says he knows of no cases in which the courts have so held. However, I have just cited one case. I can cite the Senator another. *Duplex Printing Press Co.* v. *Deering* (254 U.S. 443):

> By repeated decisions of this court, it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the lawmaking body.

It was for this reason that I joined with others in attempting to send the bill to committee, in the first instance, so that the courts would have a reliable committee report upon which to gage and judge and ascertain the intent of the legislative body.

Mr. HUMPHREY. I say most respectfully to the Senator that in the circumstances in which we find ourselves, if the Senator in charge of the bill, or the Senator who submits an amendment to a bill makes a statement relating to the bill, while it is not conclusive, it is considered to be relevant and considered to be interpretive of the statute.

But there is an easy way to answer the Senator's question: Let the Senator put what he wants into an amendment. I do not see any reason for him to be on the fringes of this issue. All he has to do is to offer an amendment, if he has any doubts.

The Senator has been discussing the amendment with me. There is no problem. I should be happy to join him in encouraging Senators to approve of his amendment.

I should like to make one further reference to the Gary case. This case makes it quite clear that while the Constitution prohibits segregation, it does not require integration. The busing of children to achieve racial balance would be an act to effect the integration of schools. In fact, if the bill were to compel it, it would be a violation, because it would be handling the matter on the basis of race and we would be transporting children because of race. The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the school systems. The natural factors such as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, if the school districts are not gerrymandered, and in effect deliberately segregated. The fact that there is a racial imbalance per se is not something which is unconstitutional. That is why we have attempted to clarify it with the language of section 4.

Mr. BYRD of West Virginia. I concede that the statement by the Senator as floor manager of the bill would doubtlessly stand upon a more solid footing than would statements by certain other Senators when it comes to ascertaining the intent of this legislative body by the courts.

I close by saying that the discussion we have had today points up, in my judgment, the fact that there is much about the substitute which needs further exploration, further explanation, and a considerable amount of additional debate in order that the language might be made unambiguous and clear to all Senators who will vote on the bill.

In my judgment, the language that we have been discussing is not at all clear. I appreciate the interpretations that have been placed upon it by the distinguished Senator from Minnesota and by the distinguished Senator from New York [Mr. JAVITS]. I think they have been helpful. But it is just such discussions as this which will be of assistance to us as we proceed to move in the direction of a vote on cloture, and, if cloture is invoked, a vote on the bill. But I insist that there is much language in the substitute, as there is much language in the bill, which is unclear to this Senator. And I would judge that it is unclear to other Senators.

Mr. HUMPHREY. Mr. President, I say most frankly to the Senator from West Virginia that I have never voted on a bill yet and I have been in the Senate for 15 years now—when I was perfectly clear on the bill. We voted on the tax bill a few months ago. It was more than 300 pages long and there are more than 1,000 amendments in the tax code. No lawyer in the United States knows exactly what it means. It will be debated in the law from now until kingdom come. But we voted on it because we thought we knew enough about it to come to a decision on it.

Mr. BYRD of West Virginia. Mr. President, this Senator would not insist that he is ever perfectly clear on each and every bill that he votes on in the Senate. I agree with the Senator from Minnesota that we all vote on bills which are not perfectly clear to all of us, and concerning which we do not have a thorough and complete understanding. Often we have to depend upon the chairman of the committee, which committee has carefully studied the bill. But at least, we usually have committee reports which we can rely upon, and from which we can glean understanding. But, in this instance, we do not have even a committee report.

Mr. HUMPHREY. The Senator is correct.

Mr. BYRD of West Virginia. We can only lean upon the understanding as it is meted out to us or expressed by the floor manager of the bill, and upon our own understanding from a reading of the bill.

II.

THE MAJORITY OPINION PROVIDING DIFFERENT RULES FOR APPELLANTS, AS OPPOSED TO THOSE IN THE REST OF THE COUNTRY, IS UNSUPPORTED IN LAW OR JURISPRUDENCE

The majority opinion, in order to reach its conclu-
n, requiring mandatory racial mixing attempts to create two
ies of law, each to apply to a different section of the
ntry. It rationalizes that the plain and clear language
legislative history[11] of the Civil Rights Act applies
the non-southern states.[12]

That despite Congress' clear intention to incorporate
principles of the constitutional distinction between
irmative integration and the elimination of segregation
set forth in Bell v. School City of Gary, 231 F. Supp.
(Northern District of Indiana, 1963), to which the
ority opinion herein refers at pages 63-64, there is
hing in the legislative history that indicates that Congress
ended in the slightest to limit the constitutional principles
ted in Bell to "de facto" schools.

Legislative history set forth in other places in the
ef.

"A number of provisions of the Constitution of the United
tes clearly supply the means 'to secure these rights', and
R. 7152, as amended, resting upon this authority, is designed
a step toward eradicating significant areas of discrimination
a nationwide basis. It is general in application and
ional in scope.' House Judiciary Committee Report No. 914,
Accompany H. R. 715, 2 U.S. Code Congressional and Adminis-
tive News, 88th Cong. 2nd Sess. 1964, 2933." Jefferson
12, footnote 17.

Jefferson, p. 63.

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It clearly demonstrates that Congress in reference to the Bell case approved and incorporated in the act the constitutional principle expressed therein (through quotations from the Briggs "dictum") of the distinction between integration and the elimination of segregation.

It is difficult to understand how the Constitution can require integration in formerly "de jure" school systems but not require integration in Northern "de facto" systems. The Constitution either requires integration or it does not, and if it requires integration it requires it everywhere. It requires the elimination of segregation only in "de jure" situations, but a duty of affirmative integration could only be applicable alike to "de jure" and "de facto". The majority opinion does not attempt to explain the reason for its conclusion that the constitutional duty to "integrate" exists in one place but not another.[13]

The conclusion of the majority opinion that the situation existing in Bell involved only "de facto segregation" is not consistent with the majority's own definition of "de jure

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[13] This is even more pertinent when the other states which by statute permitted segregation are not treated in a like manner - Arizona, Kansas, New Mexico and Wyoming (1959 Comm. on Civil Rights Report 158).

egation" as being one in which "the separation originally
racially motivated and sanctioned by law".[14] For,
oted in the *Bell* opinion in 213 F. Supp. at 822, the
ol system involved in that case was originally segregated
: sanction of state law:

> "Prior to 1949, Gary had segregated schools in what is commonly known as the Pulaski Comples, . . .This was in accordance with the separate but equal policy, then permitted by Indiana law. (Burns Indiana Statutes Annotated, 1948 replacement, pocket supplement, Section 28-5158).[15]

, the school system involved in *Bell* had 'de jure segre-
on" prior to 1949. The school systems involved in the
ent appeals had "de jure segregation" prior to its
ination pursuant to the Supreme Court's mandate in 1954
the institution of its desegregation plans. The only
distinction is one of time -- 1949 as compared with the
when the appellee school boards instituted their desegre-
on plans. If this constitutes a basis for a constitutional
inction between a requirement of "integration" and of

Opinion, p. 77.

Prior to 1949, the Indiana law provided in part as follows:

> "The trustee or trustees of such township, town or city, may organize the colored children into separate schools of the township. . ."
> (Emphasis added)

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the lack of such requirement, t
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perceived by Congress.[16]

III.

THE 1966 GUIDELINES R
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336 F. 2d at 998.

17. Jefferson, p. 8.

18. Jefferson, p. 8

19. Jefferson, p. 9.

20. ". . .No such rule, regulat
effective unless and until appro
Civil Rights Act of 1964, Sec. 6

the lack of such requirement, there is absolutely no indication in the legislative history that this distinction was perceived by Congress.[16]

III.

THE 1966 GUIDELINES RELIED ON BY THE COURT VIOLATE THE 1964 CIVIL RIGHTS ACT AND DECISIONS OF THIS COURT

The Court in one fell swoop has declared that the HEW Guidelines are "based on decisions of this and other courts",[17] are "within the scope of the Civil Rights Act of 1964"[18] and "are required by the Constitution".[19]

The 1966 Guidelines proport to be rules and regulations, compliance with which, is necessary to receive "federal funds". Congress in seeking to avoid administrative irresponsibility required Presidential approval for such edicts.[20]

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[16] Downs v. Bd. of Ed. of Kansas City, 336 F. 2d 988 (10th Cir. 1964), likewise involved a system which had been compulsorily segregated under state law before its desegregation in compliance with Brown --that Board being one of the defendants in the original Brown decision. Yet, the 10th Circuit applied the same principle that the Constitution does not command integration -- and significantly it cited primarily the decisions from the Fifth Circuit (Avery, Stell, Evers, Boson, etc.) involving "de jure" or formerly "de jure" systems. 336 F. 2d at 998.

[17] Jefferson, p. 8.

[18] Jefferson, p. 8

[19] Jefferson, p. 9.

[20] ". . .No such rule, regulation, or order shall become effective unless and until approved by the President. . ." Civil Rights Act of 1964, Sec. 602

The great stress placed on this provision is clearly showed by congressional debate.[21]

Despite the clear language of the law, as well as its intent, the HEW regulations of 1966 (adopted by this Court) have never been approved.

In addition to being illegally adopted, the guidelines are in many instances in direct conflict with and contrary to the provisions of the Civil Rights Act of 1964. Some of the most pertinent provisions of the Act are.[22]

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21. "Suppose the Office of Education establishes a regulation that there shall be no racial imbalance in the schools of any district which receives Federal assistance. Cannot the Office of Education, pursuant to carrying out this regulation, deny assistance to school districts wherein racial imbalance exists?

MR. HUMPHREY. Let me read from the substitute:

Provided, That nothing herein shall empower any official or court of the United States to issue any order.

MR.BYRD of West Virginia. "To issue any order," but does it provide that the Office of Education shall not cut off Federal assistance?

MR. HUMPHREY. But in order to cut off Federal assistance, the President would have to issue the order, if the Senator will read section 602.

MR. BYRD of West Virginia. The words are:

No such rule, regulation, or other shall become effective unless and until approved by the President.

MR. HUMPHREY. That is correct.

MR. BYRD of West Virginia. What assurance does the Senator give me that the President will not approve such a requirement?

MR. HUMPHREY. Because I do not believe the President will violate the law." Congressional Record,June 1964, p.12715

22. Section 401(b): ". . . but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

Section 403: "The commission is authorized. . . to render technical assistance to such applicants in the preparation, adoption and implication in the plans of desegregation in public schools."

(Footnote No. 22 - continued on
next page)

(Footnote No. 22 - continued)

Section 407(a): ". . .privided t
shall empower any official or court of
issue any order seeking to achieve a r
school by requiring the transportation
school to another or one school distri
to achieve such racial balance. . ."

Section 410: "Nothing in this ti
fication and assignment for reasons ot
religion, or national origin."

Section 601: Limits the applicati
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Section 602: "No such rule, regul
become effective unless and until appro

Section 602: Compliance can be re
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Section 604: ". . .nothing contai
shall be construed to authorize action
Department or Agency with respect to any
of any employer."

Section 701(b) of Title VII - Equal
- specifically excepts: ". . .a state c
division thereof."

Section 702: "This title shall not
educational institution with respect to
individuals to perform work connected wi
activities of such institution."

Section 703(j): "Nothing contained
be interpreted to require preferential t
individual or any group because of race.
imbalance which may exist with respect to
or percentage of persons of any race".

(Footnote No. 22 - continued)

Section 407(a): ". . .privided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils from one school to another or one school district to another in order to achieve such racial balance. . ."

Section 410: "Nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin."

Section 601: Limits the application of Title VI to "any program or activity receiving federal financial assistance."

Section 602: "No such rule, regulation, or order shall become effective unless and until approved by the President."

Section 602: Compliance can be required only pursuant to "any requirement adopted pursuant to this section".

Section 602: No action can be taken until the parties are notified of "failure to comply with the requirement."

Section 604: ". . .nothing contained in this Title shall be construed to authorize action under this Title by any Department or Agency with respect to any employment practice of any employer."

Section 701(b) of Title VII - Equal Employment Opportunity - specifically excepts: ". . .a state or political subdivision thereof."

Section 702: "This title shall not apply to . . . an educational institution with respect to employment of individuals to perform work connected with the educational activities of such institution."

Section 703(j): "Nothing contained in this title shall be interpreted to require preferential treatment to any individual or any group because of race. . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race".

The clear language of these provisions, which only equire desegregation and leave the general operation and ontrol of the school system are further amplified by tatements of Senator Humphrey[23] and subsequent congressional egislation.[24]

The HEW guidelines in effect, not only require esegregation, but call for integration and racial balancing ithin the school systems, both as to pupil and teachers, nd effectively place the administration of each school ystem on a "Procrustean Couch" tailoring it to, not

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3. This does not mean that Title VI would authorize a ederal official to prescribe pupil assignments, or to elect a faculty. . . .The only authority conferred would e authority to adopt, with the approval of the President, general requirement that the local school authority refrain from racial discrimination. . . ."

4. Section 604 of the Education Act (as amended by Section 81 of the Education Amendments of 1966, P. L. 89-750, 0 Stat. 1191) entitled "Federal Control of Education Prohibited";

Section 604: "Nothing contained in this Act shall e construed to authorize any department, agency, officer, r employee of the United States to exercise any direction, upervision, or control over the curriculum, program of nstruction, administration, or personnel of any educational nstitution or school system, or over the selection of ibrary resources, textbooks, or other printed or published nstructional materials by any educational institution r school system, or to require the assignment or transportation of students or teachers in order to overcome acial imbalance."

constitutional limits, but ac

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25. Section 181.3: "It sets
voluntary desegregation plans
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Section 181.11: "In som
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Section 181.13(d): "The
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minority. . ."

Section 181.14(b)(4): Whe
are involved "free choice dese
may not be applied to such pro

constitutional limits, but administrative dictates.[25]

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[25] 25. Section 181.3: "It sets forth the requirements which voluntary desegregation plans must meet for the Commissioner to determine under the HEW Regulation that a plan is adequate to accomplish the purposes of Title VI."

Section 181.11: "In some cases, the most expeditious means of desegregation is to close the schools originally established for students of one race,"

* * *

"To reorganize the grade structure of schools originally established for students of different races so that these schools are fully utilized, on a desegregated basis, although each school contains fewer grades."

* * *

"Under certain conditions, a plan based on free choice of school may be a way to undertake desegregation."

Section 181.13(a): "The racial composition of the professional staff of a school system, and of the schools in the system, must be considered in determining whether students are subject to discrimination."

Section 181.13(b): "Race. . . may not be a factor in the hiring or assignment to schools or within schools of teachers or other professional staff, . . .except to correct the effects of past discriminatory assignments."

Section 181.13(d): "The pattern of assignment of teachers. . .may not be such that schools are identifiable as intended for students of a particular race. . .or that such teachers . . . of a particular race are concentrated in those schools where all, or the majority of, the students are of that race."

* * *

The assignment must follow this pattern. "The assignment of a significant portion of the professional staff of each race to particular schools in the system where their race is a minority. . ."

Section 181.14(b)(4): Where special educational programs are involved "free choice desegregation procedures normally may not be applied to such programs."

Footnote 25 - Continued)

Section 181.15: "If the facilities, teaching materials,
r educational program available to students in such a
chool are inferior to those generally available in the
chools of the system, the school authorities will normally
e required immediately to assign such students to other
chools in order to discontinue the use of the inferior
chool."

Section 181.16: Students residing in one system may
ot attend school in another system when "where the result
ould tend to limit desegregation".

Section 181.17(c): "They must take appropriate action
ith regard to any student or staff member who interfers
ith the successful operation of the plan, whether or not on
chool grounds."

Section 181.32: "A school system planning. . . to in-
lude more than one school of the same level in one or more
ttending zones. . .must show that such an arrangement will
ost expeditiously eliminate segregation. . ."

Section 181.33(b) "Minority Transfer Policy. A school
ystem may (1) permit any student to transfer from a school
here students of his race are a majority to any other school,
ithin the system, where students of his race are a minority,
r (2) assign students on such basis."

Section 181.45: If a student does not make a choice "he
ust be assigned to the school nearest his home where space
s available."

Section 181.49: "No choice may be denied in assigning
tudents for any reason other than overcrowding."

* * * *

A school system may, at its option, give preference to any
tudent whose choice is for a school at which students of his
ce are a minority."

Section 181.51: "No factor, such as a requirement for
alth or birth records, academic or physical examinations,
e operation of the school transportation system, or any
her factor except overcrowding, may limit or affect the
signment of students to schools on the basis of their
oices."

(Footnote 25 - continued on next page)

(Footnote 25 - Continued)

Section 181.54: "The Comm
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"The Commissioner. . . may requi
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See also Exhibit A - Excerpts fr
HEW Official whose district incl

(Footnote 25 - Continued)

Section 181.54: "The Commissioner will scrutinize with special care the operation of voluntary plans of desegregation in school systems which have adopted free choice plans."

* * * *

"The single most substantial indication as to whether a free choice plan is actually working to eliminate the dual school structure is the extent to which Negro or other minority group students have in fact transferred from segregated schools.

* * * *

"Where a free choice plan results in little or no actual desegregation, . . .there is reason to believe that the plan is not operating effectively. . . ."

* * * *

The Commissioner will assume that a free choice plan is an "effective means of completing initial stages of desegregation in school systems in which a substantial percentage of the students have in fact been transferred from segregated schools".

* * * *

When the freedom of choice transfers do not meet the required steps in achieving racial balance the Commissioner will "normally require school officials to take additional actions as a pre-requisite to continued use of a free choice plan, even as an interim device".

* * * *

"Where there is substantial deviation from these expectations, . . . he will require the school system to take additional steps to further desegregation."

* * * *

"The Commissioner. . . may require the school system to adopt a different type of desegregation plan."

See also Exhibit A - Excerpts from a Deposition taken of the HEW Official whose district includes Louisiana.

The HEW regulations attempt to set up minimum percentages of racial mixing in order to arrive at the decision that a school system has in fact desegregated.[26]

Fortunately, in other sections of the country these percentages and desired achievement standards are not applicable. If these standards were applied uniformly many of the sections of the nation would be effected.[27]

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26. Section 181.54 (1) (2)(3) "(1) If a significant percentage of the students, such as 8 percent or 9 percent, transferred from segregated schools for the 1965-66 school year, total transfer on the order of at least twice that percentage would normally be expected.

(2) If a smaller percentage of the students, such as 4 percent or 5 percent, transferred from segregated schools for the 1965-66 school year, a substantial increase in transfers would normally be expected, such as would bring the total to at least triple the percentage for the 1965-66 school year.

(3) If a lower percentage of students transferred for the 1965-66 school year, then the rate of increase in total transfers for the 1966-67 school year would normally be expected to be proportionately greater than under (2) above."

27. "In the school year 1961-62 there were 43000 students enrolled in the Gary public schools, 53.5 per cent of whom were Negroes. They were distributed among the forty schools as follows:

. . . 10,710 of the students . . . attended fourteen schools which were 100% white; 16,242 students attended twelve schools which were populated from 99 to 100 per cent by Negroes; 6,981 students attended five schools which were from 77 to 95 per cent Negroes; 4,066 attended four schools which had a range from 13 to 37 per cent Negro; 4,465 attended five schools which had a Negro population from one to five per cent." Bell vs. School City of Gary, 213 F. Supp. 819.

(Footnote 27 - Continued on next page)

(Footnote 27 - continued)

In New York City, 75 o
more than a 90 per cent Negr
Angeles elementary schools h
enrollment; 27 of the 127 el
were predominantly Negro; in
had Negro enrollments of 99
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Chicago. Maslow, De Facto P
6 Vill. L. Rev. 353, 354-55
& Brooks; School Integration
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Forum 185 (1960)

In New York City where
by the Board of Education, t
Advisory Committee on Human
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(Footnote 27 - continued)

In New York City, 75 of 570 elementary schools had more than a 90 per cent Negro enrollment; 77 of the 404 Los Angeles elementary schools had an 85 per cent or more Negro enrollment; 27 of the 127 elementary schools in Cleveland were predominantly Negro; in Philadelphia 38 of 272 schools had Negro enrollments of 99 per cent; and 87 per cent of the Negro students attend practically all-Negro schools in Chicago. Maslow, De Facto Public School Segregation, 6 Vill. L. Rev. 353, 354-55 (1961). See also Boucher & Brooks; School Integration and its Relation to Distribution of Negroes in United States Cities, 24 Educational Forum 185 (1960)

In New York City where a transfer plan was instituted by the Board of Education, the State Education Commissioner's Advisory Committee on Human Relations and Community Tensions has stated:

> A total of roughly 16,000 students were affected or less than 1% of all students in the public system as a whole, or about 3% of the Negro and Puerto Rican student population.
>
> Open enrollment has had no significant effect on the extent of segregation. It cannot have, as it depends wholly upon voluntary choice among Negro and Puerto Rican parents. In September, 1963, for example, when the program was revised and enlarged, about 110,000 elementary pupils were offered the opportunity to transfer. Of this number, about 2,000 applied, and some 1,800 were in fact transferred -- an impact of less than 2% of those given the option.

If after considering the foregoing, there can be
ny doubt about the desire of HEW to operate within the
mbit of previous congressional legislation, the points
aised by Mr. Howe and his staff with regard to "Equal
ducational Opportunity Act of 1967" unequivocally removes
t. The following are some of the recommended basises for
xpenditure of Federal funds thereunder.[28]

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8. (Cong. Rec.   ):

(1) Comprehensive, district-wide rezoning of school attendance areas to obtain maximum heterogeneity.

(2) Pairing, grouping or clustering of adjacent Negro and white schools with a division by grade level in two or more residential areas.

(3) Reorganization of the use of schools; reorganizing the grades of a school; convering schools to other uses; closing schools, changing feeder patterns; grade pattern reorganization.

(4) Careful site selection to locate new schools so as to maximize integration of residentially segregated student populations.

(5) Increased busing from overcrowded to underutilized schools.

(6) Development of "magnet" high schools, each specializing in a different subject area with enrollment open to the entire school district on the basis of interest rather than ability.

(7) Development of supplemental educational centers, comprehensive community schools and shared time programs to draw district-wide enrollment as well as participation from private and parochial schools.

(Footnote 28 - Continued on next page)

(Footnote 28 - continued)

(8) Open enrollment, vo
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(9) Creation of metropo
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(10) Suburban-Inner Cit

(11) In-class pupil gro
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(12) In service trainin
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(14) Teacher assignment
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(15) Improvement of rec
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(Footnote 28 - continued)

(8) Open enrollment, voluntary enrollment and free transfers.

(9) Creation of metropolitan school districts to include urban and suburban areas.

(10) Suburban-Inner City pupil exchanges.

(11) In-class pupil grouping to avoid racial separation, development of upgraded primary classes, remedial and compensatory programs within the framework of regular classroom structure.

(12) In service training for teachers and other school personnel; employment of specialists to advise school personnel, parents, children and the public on problems of desegregation; improving guidance and counseling services.

(13) Development of new curricular materials, particularly those including proper representation of racial and religious minorities.

(14) Teacher assignment to assure faculty integration at all schools.

(15) Improvement of recruitment and advancement of minority group teachers who are motivated to teach in ghetto schools and in transitional programs.

IV.

THE REQUIREMENT FOR UNIFORMITY BY VIRTUE OF A DETAILED DECREE IS CONTRARY TO LAW AND EFFECTIVELY REMOVES THE ADMINISTRATION OF THE SCHOOL SYSTEM FROM LOCAL SCHOOL OFFICIALS.

The Court on page 118-134 set forth a highly detailed decree which district courts are directed to follow.

One of the most fundamental points decided in the Brown case was that the administration of the school, even during a transition period, should be left in the hands of local officials because of the various problems existing.[29]

While constitutional principals, of necessity, should be uniformed, the district judge and the school officials should not be hampered with complexed, rigid

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[29] "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, ve believe it appropriate to remand the cases to those ourts.

"In fashioning and effectuating the decrees, the ourts will be guided by equitable principles. Traditionally, quity has been characterized by a practical flexibility in haping its remedies and by a facility for adjusting and econciling public and private needs" Brown v. Topeka, 49 U.S. 294, 299, 75 S. Ct. 753

rules in affording the flexibi

situations.[30]Under the decree

officials are relegated to a p

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[30] The sections of the decre
the right of the boards to ope
criminatory basis are:

"II. (a) . . . (1) is exer
or a higher grade, o
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(b). . . All student
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VII. . . . shall locate
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(Footnote 30 - conti

rules in affording the flexibility necessary in varied situations.[30] Under the decree of the Court, local school officials are relegated to a position of merely tax collectors rather than administrators of their school system.

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30. The sections of the decree which most flagrantly violate the right of the boards to operate a system on a non-discriminatory basis are:

> "II. (a) . . . (1) is exercising a choice for the ninth or a higher grade, or (2) has reached the age of fifteen at the time of the exercise of choice. . .
> (b). . . All students,. . . shall be required to exercise a free choice of schools annually.
> (c). . . years shall commence March 1 and end March 31 preceding. . .
> (d). . . assigned to the school nearest his home where space is available
> (e). . . by first-class mail an explanatory letter and a choice form to the parent (or other adult person acting as parent, if known to the defendants) of each student, together with a return envelope addressed to the Superintendent. . . .
> (h). . . No statement of reasons for a particular choice, or any other information, or any witness or other authentication. . . .
> (l). . . no preferences shall be given to any student for prior attendance to a school . . .
> III. . . . on the date the choice period opens or as soon thereafter as the school system learns that he plans to enroll. . . .
> V. . . . or affiliated with the school . . .
> VI. (a). . . such school shall be closed as soon as possible,. . .
> (b). . . The defendants shall provide remedial education programs which permit students attending or who have previously attended all-Negro schools to overcome past inadequacies in their education.
> VII. . . . shall locate any new school and substantially expand any existing schools with the objective of eradicating the vestiges of the dual system and of eliminating the effects of segregation.

(Footnote 30 - continued on next page)

CONCLUSION

Unfortunately, the opinion rendered herein has established a new constitutional doctrine.[31] The result of this doctrine is to "force feed" a certain section of the country with a diet, unpalatable and unprescribed for the balance of the nation. Constitutional principles must be applied on a national basis. Punitive sectionalism cannot endure. The purpose of permitting the courts to devise plans under

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(Footnote 30 - continued)

VIII. (a). . . except that race may be taken into account for the purpose of counteracting or correcting the effect of the segregated assignment of teachers in the dual system. . . .
(c). . . The defendants shall take steps to assign and reassign teachers and other professional staff members to eliminate past discriminatory patterns.
IX. (l). . . percentage of pupils actually transferred or assigned . . .
(ii). . . The report shall also set forth the number of faculty members of each race assigned to each school for the current year. . . ." Jefferson, pages 119 - 131.

[31] "As the Constitution dictates, the proof of the pudding is in the eating: the proof of a school board's compliance with constitutional standards is the result -- the performance. Has the operation of the promised plan actually eliminated segregated and token-desegregated schools and achieved substantial integration?" Jefferson, p. 112.

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[32] "What the decree contemplat
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key that opens all doors to equa
Jefferson, p. 115.

[33] Despite references to "educ
it is clear that desired result
sound educational principles.

the Brown decision was to grant time to adjust school systems to a new decision regarding rights, but was not an invitation to conduct social inovation.[32] Unless the decision of the majority is overruled, the school districts in this Circuit will be relegated to a test tube in the laboratory of administrative social experimentation.[33]

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[32] "What the decree contemplates, then, is continuing judicial evaluation of compliance by measuring the performance -- not merely the promised performance -- of school boards in carrying out their constitutional obligation 'to disestablish dual, racially segregated school systems and to achieve substantial integration within such systems.' District courts may call upon HEW for assistance in determining whether a school board's performance measures up to its obligation to desegregate. If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom of choice plan, such as a geographic attendance plan, a combination of the two, the Princeton plan, or some other acceptable substitute, perhaps aided by an educational park. Freedom of choice is not a key that opens all doors to equal educational opportunities." Jefferson, p. 115.

[33] Despite references to "educational experts" of HEW, it is clear that desired result was more important than sound educational principles. See Exhibit B.

Respectfully submitted,

JACK P. F. GREMILLION
Attorney General
State of Louisiana

WILLIAM P. SCHULER
Sec. Assistant Attorney
General

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District Attorney
First Judicial District
Shreveport, Louisiana

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Bossier City, Louisiana

FRED L. JACKSON
District Attorney
Second Judicial District
Homer, Louisiana

CERTIFICATE OF SERVIC

I hereby certify that a copy

has been served on attorneys for appella

the United States mail, postage prepaid

to them:

Hon. John Doar
Asst. Atty. Gen.
Department of Justice
Washington, D.C. 20530

Mr. Norman Amaker
10 Columbus Circle
New York, New York

Hon
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Mr
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Mr. Richard B.
2209 Dryades St
New Orleans, Lo

New Orleans, Louisiana, this ________d

WILLIA

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served on attorneys for appellants by placing same in the United States mail, postage prepaid and properly addressed to them:

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Department of Justice
Washington, D. C. 20530

Mr. Alvin J. Bronstein
603 N. Farish St.,
Jackson, Mississippi

Mr. Richard B. Sobol
2209 Dryades St.,
New Orleans, Louisiana

New Orleans, Louisiana, this ________day of February, 1967.

____
WILLIAM P. SCHULER

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF ARKANSAS

Pine Bluffs Division

* *

DERMOTT SPECIAL SCHOOL DISTRICT *
OF CHICOT COUNTY, *
Plaintiff *
vs. * Civil Action No. PB66C94
JOHN W. GARDNER, As Secretary *
of the Department of Health,
Education and Welfare *
and
HAROLD HOWE, II, AS UNITED *
STATES COMMISSIONER OF
EDUCATION, *
Defendants *

* *

Washington, D. C.,
Thursday, January 26, 1967

Deposition of

HERBERT C. KANE

a witness, called for examination by counsel for the plaintiff, pursuant to agreement of counsel, in Room 3523, General Services Administration Region 3, 7th and D Streets, Southwest, Washington, D. C., beginning at 11:00 a.m., before Adam A. Giebel, a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

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A That is correct.

Q Now, what is desegreg

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TRICT COURT

OF ARKANSAS

ion

Civil Action No. PB66C94

Washington, D. C.,
Thursday, January 26, 1967

KANE

counsel for the plaintiff,
Room 3523, General Services
treets, Southwest,
D a.m., before Adam A.
e District of Columbia,
spective parties:

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* *

deal with?

A That is correct.

Q Now, what is desegregation as you use the term in that context?

A Desegregation as I use the term, involves a situation where so far as the pupils are concerned each of the pupils has an opportunity to attend school with members either of majority or a minority group. Whether the differentiation is based upon race, color or national origin. And over and above the opportunity that a certain amount at least of progress in this area be demonstrated in each of the school districts. And so far as the faculty is concerned that the faculty assignments be such as to provide the pupils with the opportunity to be taught by members of the minority and majority again as the case might be.

Q So desegregation as it is administered by your office, comprehends not only the opportunity to freely choose a school but also comprehends the exercise of that opportunity by some significant number of students that results in them being in a desegregated situation?

A That is correct.

Q Now, I take it from what you have already testified, that in the Dermott School District your office is satisfied that the opportunity was extended but is dissatisfied with the number of persons availing themselves of the opportunity.

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Y MR. LIGHT:

How many more Negro students does the Dermott School istrict need to get into a desegregated situation during this chool year to have its eligibility restored by your office for ederal financial assistance?

Assuming that the faculty meets the requirements --

R. SMITH: Before he answers that question it should be ointed out that he has already stated that he does not make the ltimate decision on where a school district is in compliance. e makes only recommendations. It is not proper to ask him how any students would be required for compliance.

Y MR. LIGHT:

Mr. Kane, I will amend my question to ask you how any more Negro students in a desegration situation would be equired in order to prompt you to recommend that the district tatus be changed from non-compliance to one of compliance?

I would assume that approximately 50 more Negro tudents under these circumstances would indicate that the plan as working to some degree.

The complaint in this lawsuit alleges that there are 2 Negro students in the previously white school and assuming hat figure to be correct, or approximately correct, that would e your expection that the district should have approximately 0 or 62 Negro students in the previously white schools in his current year in order to be in compliance?

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MR. FOSTER: Excuse me, but a terms of what you would like t the status be restored?

THE WITNESS: Yes.

MR. LIGHT: I think the recor

MR. FOSTER: Okay.

BY MR. LIGHT:

Q Under the policies o you expect the Dermott School additional some 50 Negro stude

A Well, this is for th upon the office but rather upo gate the schools.

Q If the board arbitra and assigned them to the previ satisfy your office?

A Yes, that is one of

Q What suggestions has School District with respect t with your politices?

A At what point? We ha

Q Well, I would just l you recall that have been made

A Well, we have sugges choice period be re-opened and

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MR. FOSTER: Excuse me, but are we speculating again in terms of what you would like to see in order to recommend that the status be restored?

THE WITNESS: Yes.

MR. LIGHT: I think the record is clear on that.

MR. FOSTER: Okay.

BY MR. LIGHT:

Q Under the policies of your office what procedure do you expect the Dermott School District to follow in placing this additional some 50 Negro students in a desegregated situation?

A Well, this is for the school board. The onus is not upon the office but rather upon the school board to desegregate the schools.

Q If the board arbitrarily selected 50 Negro students and assigned them to the previously white school would that satisfy your office?

A Yes, that is one of the methods that could be used.

Q What suggestions has your office made to the Dermott School District with respect to bringing itself into compliance with your politices?

A At what point? We have made innumerable suggestions.

Q Well, I would just like for you to tell me all that you recall that have been made to this school district.

A Well, we have suggested among other things that the choice period be re-opened and re-run. We have suggested that --

* * * * * * * * * * * * * * * * *

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ood deal less than 5 per cent.

Are those all the states?

That is right.

So the amount of integration in terms of percentage
the minority group that have availed themselves of it has
ried rather widely in the states in your areas of responsibil-
?

There has been a wide variation but the question of --
way the question is put "to avail themselves of it" I do
think can be answered in this way because in many instances
have school districts that have completely desegregated.

Now, what do you mean by completely desegregated?

By closing the Negro or the white school and teaching
the children in a single educational institution, a single
ool or school grouping.

That is the ultimate objective of the enforcement
the guidelines, is it not?

That is correct. The ultimate objective is to elimin-
the dual school system and there are other districts that
e by virtue of geographic plans, achieved this degree of
egregation, so that the others that have been pairing or
ignment, the implication in the question that it was all
e choice therefore must, of necessity, be watched.

In the areas for which you are responsible, has the
forcement of the guidelines tended to achieve more racial

balance than existed before t

MR. FOSTER: Objection to t
balance." I believe it would
call for a conclusion on the
based on material that hasn't
is not in evidence.

THE WITNESS: I don't know
means.

BY MR. LIGHT:

Q Is this a term with
Kane?

A It is a term I have
to find a definition.

Q Well, let's take th
example.

A All right.

Q If the pleadings ar
children and several hundred
Is this more racially balance
children went to the Chicot
children went to the Dermott

A I don't know. I hav
term.

Q Does the Office of
any policy respecting the use

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balance than existed before the guidelines were enforced?

MR. FOSTER: Objection to the use of the term "racial balance." I believe it would be a term of art. I think it would call for a conclusion on the part of the witness that would be based on material that hasn't been yet covered and certainly is not in evidence.

THE WITNESS: I don't know what the term "racial balance" means.

BY MR. LIGHT:

Q Is this a term with which you are familiar, Mr. Kane?

A It is a term I have heard, but I have never been able to find a definition.

Q Well, let's take the Dermott School as a concrete example.

A All right.

Q If the pleadings are correct there are now 12 Negro children and several hundred white children in that school. Is this more racially balanced than it was when all the Negro children went to the Chicot County school and all of the white children went to the Dermott school?

A I don't know. I have no frame of reference for the term.

Q Does the Office of Education to your knowledge have any policy respecting the use of the term "racial balance" in administration of its business?

A Not that I know of.

Q Isn't there in fact a policy to treat that term just as you now treat it, by denying any knowledge of what it means?

MR. FOSTER: Objection, the witness previously answered the question that to his knowledge there is no policy in the Office of Education to refer to the term "racial balance" in any given way.

BY MR. LIGHT:

Q Mr. Kane, you are the chief officer to enforce the guidelines for in an area of five --

A Four.

Q Four?

(Discussion off the record.)

BY MR. LIGHT:

Q Mr. Kane, you are the Chief enforcement officer to enforce the guidelines in the area consisting of five state of the Union?

A That is correct.

Q As such, are you aware of any limitations or inhibitions on your official conduct in the field of attempting to achieve racial balance among students or faculty in the schools in your district?

A There is a referral to racial balance, I believe, in

Title IV of the Civil Right

individual who is responsib

responsibility was within T

Q You are aware, th

1964 contains the terminolo

imbalance."

A I believe it does

Q But those referen

responsibilities and, there

any more than you have just

A That is correct.

Q And in the discha

have are you aware of any w

to racial balance or imbala

duties?

A No. They have not

tion of Title VI.

Q Rightly or wrongl

your obligations in this jo

tations on the discharge of

Civil Rights Act?

A That is right.

Q You haven't paid

A Right.

Q Now, Mr. Kane, as

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I believe, in

Title IV of the Civil Rights Act. However, I am not the individual who is responsible for Title IV operations. My responsibility was within Title VI.

Q You are aware, though, that the Civil Rights Act of 1964 contains the terminology "racial balance" and also "racial imbalance."

A I believe it does, yes.

Q But those references in the Act don't affect your responsibilities and, therefore, you haven't studied the matter any more than you have just indicated here?

A That is correct.

Q And in the discharge of the duties that you presently have are you aware of any way that the references in the Act to racial balance or imbalance have affected your job or your duties?

A No. They have nothing at all to do with the implementation of Title VI.

Q Rightly or wrongly, you have been able to discharge your obligations in this job without being aware of any limitations on the discharge of your duties by those terms in the Civil Rights Act?

A That is right.

Q You haven't paid any attention to them, is that right?

A Right.

Q Now, Mr. Kane, assume for a moment without implying

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF ARKANSAS

Pine Bluffs Division

* * * * * * * * * * * * * * *

SPECIAL SCHOOL DISTRICT *
OT COUNTY, *
*
Plaintiff *
*
*
s. * Civil Action No. PB66C94
*
GARDNER, as Secretary *
Department of Health, *
on and Welfare *
and *
HOWE, II, AS UNITED *
COMMISSIONER OF *
ON. *
Defendants *

* * * * * * * * * * * * * * * * *

Washington, D. C.,

Thursday, January 26, 1967

tion of

DAVID M. BARUS

ess, called for examination by counsel for the plaintiff, t to agreement of counsel, in Room 3523, General Services tration Region 3, 7th and D Streets, Southwest, Washington, beginning at 3:00 p.m. before Adam A. Giebel, a Notary in and for the District of Columbia, when were present on of the respective parties:

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* * * * *

under two years.

Q What academic prepar
an attorney?

A I graduated from Bro
laude, Phi Beta Kapa. I was a
of Oxford in England for two y
MA degrees, and I hold the LLB
where I graduated in 1954.

Q And just very briefl
and entering upon your present

A I was engaged in the
most of this period in Washing

Q You have no formal t
administration of public schoo

A No formal training;

Q And you have no expe
extent to which you have becom
years in this capacity?

A That is not entirely
in teaching. But it is substan
perienced as a school administ

Q How old are you, Mr.

A I am 40.

Q Since we are not goi
tion, could you tell me how ol

* * * * * * * * * * * * * * * * *

under two years.

Q What academic preparation did you have for becoming an attorney?

A I graduated from Brown University in 1949, magna cum laude, Phi Beta Kapa. I was a Rhodes Scholar at the University of Oxford in England for two years, from which I hold the BA and MA degrees, and I hold the LLB degree from Harvard Law School where I graduated in 1954.

Q And just very briefly what did you do between 1954 and entering upon your present employment you just told us about?

A I was engaged in the private practice of law for the most of this period in Washington, D. C.

Q You have no formal training, I take it, in the field of administration of public school systems?

A No formal training; that is correct.

Q And you have no experience in that field other than the extent to which you have become exposed to it in the last two years in this capacity?

A That is not entirely correct. I have had some experience in teaching. But it is substantially true that I am not experienced as a school administrator.

Q How old are you, Mr. Barus?

A I am 40.

Q Since we are not going to take Mr. Seeley's deposition, could you tell me how old he is?

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1967

laintiff,

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Washington,

Notary

present on

I think Mr. Seeley is 37 or 38. I can also tell you
hing of his education qualifications if you would like to
them.He is a lawyer as well as an educator.

Birefly outline his qualifications for us.

He holds degrees from, I believe he is an undergraduate
rvard and he has his law degree from Yale. He has an
tion certificate or diploma, I am not sure which, from
rd, and he has had some considerable experience in education-
ministration both in and out of the government.

Do you know where he had the experience that was not
al Government experience?

He was a part of the faculty, I believe, at the
rd Graduate School of Education, and I am under the
ssion that as a part of that he had worked in educational
istration. But beyond that I don't know. Certainly,
d have experience in that area overseas, I know that, as

Has he ever actually been engaged in the day-to-day
ess of running a school system, a public school system?

No, he has not. Commissioner Howe has, of
e, having been the school superintendent for many years.

Mr. Barus, you have been identified by Mr. Kane during
estimony as the individual probably most closely associated
he drafting of the 1966 guidelines. Is that a substanti-
fair statement?

A I guess the best wa
the person whom the Commissio
primary responsibility for th
in developing the revisions i
culminated in the revised sta
1966.

Q Were you here when
a number of meetings when the
tion of these revisions some

A I was not here when

Q All right, sir.

Did you also attend
if not, what proportion of th

A I think I attended
level within the Department a
when they were in the process c

Q Mr. Kane attempted
were present at the meetings
tion to himself the other fou
his counterparts and yourself
others I don't recall them.

Would you now recal
remember that attended those
just mentioned?

A Well, it would not

A I guess the best way to put it would be that I was the person whom the Commissioner and Mr. Seeley designated the primary responsibility for the work of the Office of Education in developing the revisions in the guidelines that ultimately culminated in the revised statement of policies issued in March 1966.

Q Were you here when Mr. Kane testified that there were a number of meetings when the Department engaged in the preparation of these revisions some of which he attended?

A I was not here when he so stated but that is correct.

Q All right, sir.

Did you also attend all such meetings that were held or if not, what proportion of them?

A I think I attended virtually every meeting at every level within the Department at which the guidelines were discussed when they were in the process of revision.

Q Mr. Kane attempted to recall for us the persons that were present at the meetings he attended and listed in addition to himself the other four directors of the area that were his counterparts and yourself, and Mr. Seeley. If he mentioned others I don't recall them.

Would you now recall for me all the persons that you can remember that attended those meetings that I have here just mentioned?

A Well, it would not be correct to assume from the infor-

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

ROOM [illegible]-400 ROYAL ST.
NEW ORLEANS, LA. 70130

April 7, 1967

Mr. William P. Schuler
Assistant Attorney General
of Louisiana
New Orleans, Louisiana

Re: No. 23784 - United States of America, v. Caddo Parish School Board, Et Al., and related cases Nos. 23365, 23173, 23192, 23253 and 23116

Dear Sir:

Find enclosed certified record (eight volumes) in the referenced causes for your use in the Supreme Court of the United States. Should any additional papers be needed they can be certified as a supplemental record.

Also enclosed are copies of the opinions and judgments, which should be printed as an appendix to your petition for writ of certiorari, as provided by the rules of the Supreme Court.

My statement in the amount of $6.40 is enclosed to cover the cost of certifying the proceedings, which I ask that you please remit.

Please acknowledge receipt.

Very truly yours,

EDWARD W. WADSWORTH, CLERK

By

Gilbert F. Ganucheau
Chief Deputy Clerk

encl.
cc: Hon. John Doar
Mr. A. P. Tureaud
Mr. Norman C. Amaker
Mr. John A. Richardson
Mr. J. Bennett Johnston Jr.
Mr. James M. Nabrit, III
Mr. Alvin J. Bronstein
✓ Mr. Carl Rachlin
Mr. Robert F. Collins
Mr. Fred L. Jackson
Mr. John F. Ward, Jr.
Mr. William T. Keenan
Mr. Stanley E. Tolliver
Mr. Harold B. Judell
Mr. William P. Pipes, Jr.
Mr. Albin P. Lassiter
Mr. William [illegible] Baker

(1)

523
7625

8 white - 1756
1 " 876
132 teachers

4 negro - 1,180
1 " - 490
76 teachers

MAY IT
PLEASE
THE COURT

1 ~~#~~ The complaint sought desegregation of schools in Jackson Parish

2. sought desegregation of faculty

3 sought Initial assignments without regard to race

②

4. The complaint was based upon the Fourteenth Amendment and Title 28, 1981 et seq.

~~5~~

5. No reliance in the complaint was placed upon the Civil Rts Act of 1964 ~~IX~~ VI ~~#~~ Titles IV or

nor is the interventional

6. ~~the intervention~~ of the U.S. is not based upon Titles IV or VI but upon Title IX ~~titular~~ § 2000h-2, giving ~~him~~ U.S. the right to intervene in certain actions under the 14th Amend.t

6(a) The Bi Racial School System was admitted in the answer as well as the fact that no negro or white child had ever applied

(7)

for transfer under the racial transfer plan

7 We appeal from the order of Judge Dawkins which in substance adopted the proposed plan with some modifications ~~proposed~~ by the School Board

Record

plan R. 32-37
Order R. 47-53

~~8 What is wrong with the order is set forth in~~

~~8 The order of Judge Dawkins is~~

8. Our objections to the plan and consequently to the order are set forth in the record at 40-47. The plan is basically a free choice plan with wide latitude to the Board to deny the choice

9 In great detail from pages 15-18 of U.S. brief the deficiencies of the order are set forth

10 But the first question is not whether this free choice plan is any good or not but rather whether the Bi-Racial school system has been abolished and schools equally available to all children without regard to race

11 In other words has this school board complied with the U.S. Constitutional demand ~~has~~ that it desegregate its schools and does ~~this~~ order the Court comply with the Const'l demand?

12 — The most obvious, (perhaps not the only way, test as to whether the school Board is complying with the constitution ~~is by observing what has happened and~~ by ending the bi racial school system is to observe what in fact has happened

5

13, What has happened! The records in all these cases all variations on free choice plans, show that with minor exceptions, there has been no change in substance in the bi-racial school system

14 – In Jackson Parish, negro children have moved to a white school except for that the same system in the same buildings still exists

8 white schools
4 negro grade schools

segregated teachers

15 – To us this shows the failure of the order to end segregation: denial of Federal constitutional rights still continues

16 – It shows further that

the U.S. the Courts and attorneys involved
we have been too much concerned with procedural ~~d~~equality, and not enough with substantive equality; too much concerned with procedural desegregation and not enough with desegregation in fact, in reality.

17- Plaintiffs have the right to obtain the benefits of the Constitution in fact not merely on paper

18 - ~~free choice plans~~
Thus any decree of this court must address itself, we urge, not merely with a theoretical opening of the school doors but ~~also~~ rather with ~~a~~ the actual passing through of children

19 – The indicia of segregation must be removed

~~20~~ ~~Thus any decree to the District Ct~~ ~~[illegible]~~ should ~~carry with it~~

20 Because of this we are not concerned so much ~~with~~ how the school Bd carries out its constitutional duty, namely end in fact the Bi-racial school system – rather we are concerned with making sure it is ended

21 Thus the decree of this court to the District Ct we urge, should direct the filing of new plans promptly ~~and it~~ by the school board, and that plan must be specific as to ~~what it~~ what it will do, and how many children will be affected; ~~for how many~~ how many ~~others~~ will pass through the

doors of segregation

22 ~~We are~~ u We say we should be less concerned with uniformity, less concerned with directing school boards ~~how to~~ to be one like the other. Let them be as different as they like so long as the constitution is followed

~~23~~

23 Let the new school Bd proposal show that substantive desegregation has taken place, ~~and we~~ and our constitutional concerns, whatever our concern as parents and citizens may be, are just about over

24 – I think we will find that if we have substantive desegregation, substantive equality, most of our concerns

about faculty desegregation
about equality of services
will disappear

25 – Our concern for faculty desegregation is important ~~fo~~ in good part because it is further proof, when the faculty is segregated, that there is not ~~desegrega~~ a termination of the bi-racial school system in fact and thus not a compliance with pltfs constitutional Right

26 – Similarly, this is so with services, but when there will be desegregation ~~of~~ children in fact not merely on paper then in all likelihood the other parts will fall in place.

27 – Thus the school Board should show ~~how many~~

10

~~children will be~~
that, substantial desegregation takes place
under its plan

28 - The exact figures may vary from district to district, so will the percentages, but let it be substantial in each case, not merely a token

29 - almost of necessity this means a rejection of so-called "free choice"

30 - We regret that the proposed decree of the U.S. is framed in terms of free choice since ~~there~~ the Guide lines permit broader and we believe better results

31. There may be an isolated

community ~~that~~ in Alabama
where things are more relaxed
that can work with Freedom of
choice, but this would not
apply to Northern Louisiana

31 a – What is educational argument

32 – Free choice ~~is not a~~ is a Negro
~~the~~ only situation
Because of social history
white children will all select
white school – Negroes then
are the outlanders trying to
come in
This is another example
why free choice is an illusion
it is an example of paper but
not real equality

Let us

33 – ~~Free choice is an example invitation~~
~~to violence~~

33 – Invitation to violence
~~Ct will d~~ Ct must
consider whether free choice

doesn't do harm to all concerned

34 It makes those who wish to resist think they have ~~an~~ another chance

35 It holds back the right of the children concerned
thus frustrate the const'n

~~a~~ A

36 – as to proposed Gov't decree – if we must have free choice – I hope not – then the proposal is good with one major exception

Mss
546 SEDFRE

Callender et al. vs Florida, July, 1961 - March, 1966

Box 35
Folder 1

State Historical Society of Wisconsin

Please Retain Original Order

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1965

HERBERT EBENEZER CALLENDAR, Appellant, vs. STATE OF FLORIDA, Appellee.	**	CASE NO. 32,648
LESLIE SMITH, Appellant, vs. STATE OF FLORIDA, Appellee.	**	CASE NO. 32,649
JAMES O'CONNOR, Appellant, vs. STATE OF FLORIDA, Appellee.	**	CASE NO. 32,650

Opinion filed January 5, 1966

Appeals from the District Court of Appeal, First District

Ernest D. Jackson, for Appellants

Earl Faircloth, Attorney General, and George R. Georgieff, Assistant Attorney General, for Appellee

ON PETITION FOR REHEARING GRANTED.

PER CURIAM.

The Appellants Callendar, Smith, and O'Connor were convicted in the County Judge's Court for Marion County on a charge of unlawful assembly in violation of § 870.02, F.S.

Their appeal to the circuit court was dismissed on motion of the State Attorney for failure to comply with the appropriate Florida Appellate Rules. In his order dismissing the appeals the circuit judge added that he had nevertheless examined the record and briefs and found the appeals to be without merit. While it is not vital to our disposition of this cause we note that the notices of appeals before the circuit judge sought review of the verdict of the jury, the order denying the defendants' motion for new trial, and the sentence imposed on the defendants, but not of the judgment of guilt. Neither the verdict of the jury nor the order denying new trial are appealable orders. A sentence is appealable by a defendant only on the grounds that it is excessive or illegal. Section 924.06(4) F.S. It does not appear that the appellants contended that the sentence itself was either illegal or excessive. This circumstance may well account for the gratuitous statement by the circuit judge that he found the appeal to be without merit.

Following the dismissal of their appeals the appellants petitioned the District Court of Appeal, First District, for writ of common law certiorari, which petition was denied in an order reading: "Per Curiam. Certiorari denied." Callendar v. State, Fla. App. 1963, 151 So. 2d 80; Smith v. State, Fla. App. 1963, 151 So. 2d 80; O'Connor v. State, Fla. App. 1963, 151 So. 2d 80.

From these orders each of the appellants took an appeal to this Court, which appeals were dismissed by us, ex mero motu, because they presented no question within our jurisdiction to review. Article V, Section 4(2), Florida Constitution.

Thereafter the Supreme Court of the United States granted certiorari and reversed our order dismissing these appeals by a per curiam decision in the following words (No. 58. Decided April 26, 1965):

> "The petition for writ of certiorari is granted and the judgments are reversed. Boynton v. Virginia, 364 U.S. 454, Abernathy v. Alabama, 380 U.S. 447."

Upon receiving the Mandate of the Supreme Court of the United States in these causes we entered an order remanding them to the District Court of Appeal, First District, with instructions that they in turn be remanded to the circuit court and then to the County Judge's Court, Marion County, and that the judgments and sentences be vacated.

Following our order the State petitioned for rehearing which we granted. After hearing oral argument on rehearing we have determined that our first order entered on the mandates was erroneously made and therefore must be, and is, withdrawn for reasons to be discussed below.

The jurisdiction of this Court, the Supreme Court of Florida, is both limited and defined by the constitution of this State. Section 4(2) Article V, Florida Constitution. Insofar as appellate review of decisions of the several district courts of appeal is concerned we have authority to entertain an appeal of a decision of one of those courts only if the decision either (1) initially (for the first time in the cause) passed directly upon the validity of a state or federal statute, or (2) construed a controlling provision of either the state or federal constitution. For meaning of "construing" a constitutional provision as used in our constitution see Armstrong v. City of Tampa, Fla. 1958, 106 So. 2d 407. We have consistently interpreted our constitution to deny this Court authority to entertain an appeal from an order of a district court unless such order either passed upon the validity of a statute or construed a constitutional provision. Evans v. Carroll, Fla. 1958, 104 So. 2d 375; State ex rel. Emanuel v. Cooper, Fla. 1963, 152 So. 2d 471.

It is obvious that the district court of appeal's simple per curiam orders denying certiorari from which the subject appeals were taken to this Court neither directly passed on the validity of a statute nor construed a provision of either state or federal constitutions. We therefore had no power, authority, or jurisdiction to act on the appeals.

It is true that Section 59.45 F.S. authorizes us to treat appeals which have been improvidently brought as petitions for certiorari. However, since these decisions of the district court of appeal neither affect a class of state officers nor conflict on the same point of law with a previous decision of this Court or of another court of appeal, they do not fall within our certiorari jurisdiction. Article V, Section 4 Florida Constitution. Therefore, this procedure would avail nothing here.

Because, under the facts of this case, this Court had no authority to review the district court of appeals' orders denying certiorari we entered our order, ex mero motu, dismissing said appeals. In doing so we never reached the merits of the causes. The only jurisdiction we exercised was that necessary to determine our jurisdiction. Therefore, our decision neither reached any federal question which might have been involved in the causes, nor denied the defendant-appellants any federal right properly presented for review. Our decision was based on a valid non-federal ground, the lack of jurisdiction in this Court to act in these causes.

Since the orders of the district court of appeal involved no question reviewable by this Court either by appeal or certiorari, those orders marked the complete exhaustion of Florida's appellate processes. Defendant-appellants were then entitled to seek relief in the Supreme Court of the United States without coming to this Court. In a somewhat comparable case, Dresner v. City of Tallahassee, Fla. 1964, 164 So. 2d 208, the defendants did not go far enough in the Florida courts before seeking relief in the federal courts. In this instance it would appear the defendant-appellants went too far in the Florida courts before seeking relief in the federal Supreme Court.

In an unbroken line of decisions the Supreme Court of the United States has held that it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise. Moreover, when the state court, in entering the order attacked in the federal Supreme Court, does so on a non-federal ground, the U.S. Supreme Court has held it was without jurisdiction to review such order. Newman v. Gates, 204 U.S. 89 (1907); John v. Paullin, 231 U.S. 583 (1913); Atlantic Coast Line R.R.Co. v. Mims, 242 U.S. 532 (1916); Central Union Co. v. Edwardsville, 269 U.S. 190 (1925); McMaster v. Gould, 276 U.S. 284 (1927); Archerd v. Oregon, 290 U.S. 604 (1933); and Wolfe v. State of North Carolina, 364 U.S. 177 (1960), to name but a few. A classic statement of this view is the following contained in John v. Paullin, 231 U.S. at page 585:

> "As the Supreme Court of the State did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the State, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. See Rev. Stat., Sec. 709; Judicial Code, Sec. 237. Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision."

Nevertheless, if we correctly understand the Mandate of the Supreme Court now before us, that court has reversed our orders dismissing the subject appeals and directed this Court to enter orders vacating the judgments and sentences imposed on the defendant-appellants. To do this will require that we exercise jurisdiction in causes never properly presented to us and in which, under our state constitution, we are powerless to act. Such power can neither be bestowed on this Court by an order of the Supreme Court of the United States nor arrogated to ourselves by our own action. While we venture no remarks on the jurisdiction of the

Supreme Court to entertain these causes under the circumstances noted herein, we are constrained by our oaths of office to obey the Florida Constitution, and it prohibits our exercising jurisdiction on the merits in these causes as these mandates would require.

It is obvious from the foregoing that we cannot obey the Mandate of the Supreme Court of the United States in these causes and at the same time observe the limitations on our authority imposed by our state constitution. This poses a dilemma which we are unable to solve.

For these reasons we respectfully return the Mandates in these causes with a request that the Supreme Court of the United States re-examine its opinions and mandates in light of this opinion and thereafter clarify for this Court the action, if any, which it is required that we take.

It is so ordered.

THORNAL, C.J., THOMAS, ROBERTS, DREW and O'CONNELL, JJ., and JOHNSON, District Court Judge, concur

ERVIN, J., dissents

Supreme Court of the United States

No. -------------- , *October Term, 19*63

HERBERT CALLENDER, JAMES O'CONNOR, AND LESLIE LEE SMITH,

Petitioners,

vs.

FLORIDA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

April 13th, 19 6~~3~~4

/s/ HUGO L. BLACK

Associate Justice of the Supreme Court of the United States.

Dated this 27th

day of **February** 19 6~~3~~4

[SAME TO OTHER DEFENDANTS]

IN THE SUPREME COURT OF FLORIDA

JULY TERM A.D. 1963

TUESDAY, DECEMBER 3, A.D. 1963

HERBERT [redacted] CALLENDAR,	**	
Appellant	**	
-vs-	**	CASE NO.32,648
STATE OF FLORIDA,	**	
Appellee	**	
	**	

On consideration of the Petition for Rehearing filed by Attorney for Appellant,

IT IS ORDERED by the Court that the said petition be, and the same is hereby, denied.

A TRUE COPY,

TEST:

GUYTE P. McCORD
CLERK SUPREME COURT

(I HAVE TODAY MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, ORDER OF OCTOBER 31,1963, DISMISSING APPEAL IN THE ABOVE CAUSE)

SUPREME COURT OF FLORIDA
SUPREME COURT BUILDING
TALLAHASSEE

Honorable Ernest D. Jackson, Jr.
Attorney at Law
Broad Street, Suite [illegible]
Jacksonville, Florida [illegible]

[SAME TO OTHER DEFENDANTS]

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A. D. 1963

HERBERT EBENEZER CALLENDAR,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO. E-13

ORDER

Appellant's Petition for Rehearing having been considered,

IT IS ORDERED that the Petition be and the same is hereby denied.

WITNESS the Honorable Donald K. Carroll, Chief Judge and Seal of the Court this 25th day of March, A. D. 1963.

RAYMOND E. RHODES, CLERK

BY: Mable Marky
Deputy Clerk

A True Copy

ATTEST:

Mable Marky
Deputy Clerk First District Court of Appeal
Tallahassee, Florida

Same to [illegible]

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JANUARY TERM, A. D. 1963

HERBERT EBENEZER CALLENDAR, :
:
Petitioner, :
:
vs. :
:
STATE OF FLORIDA, :
:
Respondent. :
:
::::::::::::::::::::::::::::::

NOT FINAL UNTIL TIME EXPIRES TO
FILE REHEARING PETITION AND
DISPOSITION THEREOF IF FILED.

CASE NO. E-13

Opinion filed February 26, 1963.

A Petition for Writ of Certiorari to the Circuit Court for Marion County. D. R. Smith, Judge.

Ernest D. Jackson, for Petitioner.

Richard W. Ervin, Attorney General; and George R. Georgieff, Assistant Attorney General, for Respondent.

PER CURIAM.

Certiorari denied.

CARROLL, DONALD, CHIEF JUDGE, STURGIS and RAWLS, JJ., CONCUR.

IN THE

Supreme Court of the United States

October Term, 1963

No. ______

HERBERT E. CALLENDER, JAMES O'CONNOR,
LESLIE LEE SMITH,
Petitioners,

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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In The

Supreme Court of the United States

October Term, 1963

No.

◆

Herbert E. Callender, James O'Connor,
Leslie Lee Smith,
Petitioners,

v.

State of Florida,
Respondent.

◆

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioners pray that writs of *certiorari* issue to review the judgments of the Supreme Court of Florida in the cases of *State of Florida* v. *Herbert E. Callender, State of Florida* v. *James O'Connor,* and *State of Florida* v. *Leslie Lee Smith,* entered October 21, 1963, with petitions for rehearing denied December 3, 1963.

Citation to Opinion Below

There were no opinions below at any stage of the case.*

Jurisdiction

The Judgment of the Circuit Court of the Fifth Judicial Circuit in and for Marion County was entered August 24, 1962 (S6; O8; C8). A petition for writ of certiorari was denied by the District Court of Appeals, First District, State of Florida, February 26, 1963 (S79; O75; C77). The Florida Supreme Court dismissed the appeals on October 21, 1963 (S196; O196; C214) and denied the petitions for rehearing on December 3, 1963 (S197; O179; C215).**

The jurisdiction of this Court in each of these cases is invoked pursuant to Title 28, United States Code, Section 1257 (3), petitioners having asserted below and asserting here, deprivation of rights privileges and immunities secured by the Constitution of the United States.

---

*Appended below however are the orders of the Circuit Court of the Fifth Judicial Circuit in and for Marion County granting the State's motion to dismiss, which contain the only statement of rationale in the record below. This order in the *O'Connor* and *Smith* cases cites purported violations of the Florida appellate rules, failure to include certain references to book and page numbers of the order appealed from and the submission of a brief four days late. In *Callender* only the former procedural fault is cited. In addition, "through an abundance of caution" the Court dismisses each appeal on its merits.

The petition for rehearing on these procedural issues is relevant and is also included in the appendix. This petition was denied without opinion (S3; C3; O3).

**Time for filing this petition was extended to April 13, 1964 by order of Mr. Justice Black dated Feb. 27, 1964.

Questions Presented

On June 16, 1961 the petitioners, travelers on an interstate bus, attempted to use the terminal in Ocala, Florida, notwithstanding the local custom of racial segregation at such facilities. Due to the hostility of a few local residents the petitioners' attempt resulted in a very brief "scuffle," characterized by a State witness as a "minor thing." There was no physical violence, though a local resident did testify that his toe was stepped on while he shoved one of the petitioners. When the petitioners refused a request by a local deputy sheriff to return to their bus, they were arrested for unlawful assembly and subsequently convicted.

Did the arrest and subsequent conviction of petitioners deprive them of rights protected by:

1) the due process clause of the Fourteenth Amendment in that they were convicted without any evidence of guilty conduct;

2) the due process clause of the Fourteenth Amendment in that they were convicted under a statute which, as interpreted, was so vague and indefinite as to afford no ascertainable standard of criminality;

3) the due process and equal protection clauses of the Fourteenth Amendment in that their arrests and convictions constituted enforcement of racial segregation.

4) the due process clause of the Fourteenth Amendment, as it guarantees the First Amendment protection of freedom of expression, assembly and religion;

5) Title 49, U. S. C., Section 316(d), which prohibits discrimination in terminal facilities of bus companies operating in interstate commerce?

Was the arrest and conviction of the petitioners an unlawful burden on interstate commerce?

Statutory and Constitutional Provisions Involved

Each of these cases involves Section 1 of the Fourteenth Amendment and Article I, Section 8 of the United States Constitution.

Each petitioner was convicted under the Florida Statutes, Section 870.02:

> If three or more persons meet together to commit a breach of the peace, or to do any other unlawful act, each of them shall be punished by imprisonment not exceeding six months or by a fine not exceeding $500.00.

Each case also involves Title 49, U. S. C. §316(d):

> * * * It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: * * *

Statement

The three petitioners in these actions were convicted by juries, in three separate trials*, of violating Section 870.02 of Florida Statutes, which provides as follows:

> If three or more persons meet together to commit a breach of the peace or do any other unlawful act, each of them shall be punished by imprisonment not exceeding six months or by a fine not exceeding $500.00.

The alleged criminal activity of the defendants arose out of their participation in what the prosecution and the State's witnesses described as a "freedom ride" (*e.g.*, S93, 94, 95, 97, 99; C95, 96; O86, 96), although there was no dispute that petitioners were passengers on a regularly scheduled interstate Greyhound bus en route from Washington, D. C., to St. Petersburg, Florida (S142).

There is actually very little dispute as to the details of the occurrence, as they were elucidated in each of the three trials by both prosecution and defense witnesses. The interstate bus on which all three petitioners were passengers arrived at the bus terminal at Ocala, in Marion County,

---

*Each of the trials was of only one of the three petitioners, although the State of Florida presented essentially the same evidence in the prosecution of each petitioner. In order to avoid lengthy repetition of this evidence with respect to each petitioner, the facts are set forth herein but once with supporting reference made to each of the three transcripts. Where one of the transcripts varies from the remaining two, that fact and the nature of that variance are noted.

The references in the Statement are by page number of the transcript, preceded by the last-name initial of the defendant in that prosecution, *i.e.*, S (petitioner Smith); O (petitioner O'Connor); C (petitioner Callender).

Florida, at approximately 12:30 in the afternoon of June 16, 1961 (S91; C90; O85). The bus terminal at Ocala has the usual facilities of a public transportation terminal: parking area for busses, restaurants (in this case, both "white" and "colored" (C91) baggage room, waiting room, rest rooms, and the like (C91)).

Shortly after the arrival of the bus, Deputy Sheriff H. A. Geiger, of the Marion County Sheriff's Office, who happened to be in the waiting room of the bus terminal at the time because "we had advanced notice of what time the busses were arriving, coming into Ocala with freedom riders" (O86; *cf.* S93; C88), heard what he described as "loud words" (O87; C91) or "loud talk" (S92). Although Deputy Geiger testified in the O'Connor prosecution that he could not "recall the exact words" (O103), he testified in the subsequent Callender prosecution that he remembered "something about 'get out of here' or something" (C92).

Deputy Geiger turned his attention to the source of these "loud words" and saw that they issued from a group of "6 or 7 people just inside the [west] door [of the terminal]." (S92; *cf.* C92; O87). He further testified that as he turned his attention to the source of the "loud talk," "I seen a couple of men somewhat tussling, their arms—one pushed the other or something" (S92); "I seen some shoving between a white person and a colored person * * *" (C91; O87). Geiger and other State's witnesses identified the persons comprising this group of "6 or 7" persons as the petitioners Smith, O'Connor and Callender; and three residents of Ocala or environs, namely John H. Owens, T. W. Penuel and J. A. Windsor.

Deputy Geiger immediately approached the group, which was some fifteen feet from where he was stationed (S92), and "asked them what was wrong" (S92; *cf.* O87; C93). He testified that words were being exchanged between the petitioner Smith and Owens (C93), the latter of whom Geiger described as "a little angry" and as responsible for "the most violent language * * * the loudest language and most angry language" (O103). The substance, if not the color of that language was described by Geiger: "At that time Owens says that this man [Smith] had stepped on his foot and he demanded an apology and he said something about 'nigger' " (C107; *cf.* S96; O87).

Smith's languge, however, was at no time related or characterized by Geiger. Nor was Geiger able to describe in any detail any other action or activity of any of the three petitioners at the time he approached the group of 6 or 7 persons. In fact, Geiger specifically acknowledged that he did not see the petitioner Smith "scuffling" or placing his hands on anyone (S100). Similarly, he "couldn't say" what the petitioned Callender was doing during the alleged "scuffle" (C93). And although he did testify that he saw the petitioner O'Connor in physical contact with Owens, he could only say that O'Connor's arms were where "they possibly shouldn't have been" (S111). Yet Geiger at the same time said that Owens' arms were where "they possibly shouldn't have been" (S111); and in the prosecution of O'Connor, Geiger described O'Connor's arms as being "underneath Owens' arms" (O87; O103), while both of Owens' hands were on O'Connor's chest (O103).

Deputy Geiger, in fact, candidly acknowledged the entire occurrence, which lasted only a few seconds, as "nothing serious" (S95) and as a "minor thing" (S100). Moreover, there were no further incidents after Geiger had approached the group to ask "what was wrong" (O104).

Nevertheless, immediately upon approaching the group thus assembled just inside the door of bus terminal, Geiger ordered the entire group to go outside (S96; O96). Once outside, Geiger ordered the three local residents to leave the station premises (O88; S94). They did leave the premises proper, but took up positions in front of a tavern across the street (O108; C99). Penuel, one of the three men, returned a short time later, but was again ordered to leave, and was escorted off the premises (to his automobile parked across the street) by a police officer (O89; C99 to 100; *cf.* S105).

Deputy Geiger also instructed the three petitioners "to get back on the bus and remain there until it left Ocala" (O88). O'Connor, apparently speaking for the three of them, said to Geiger "that he was an I.C.C. passenger. He had just arrived on the bus. They were hungry, he said, we are hungry, we want to go in and eat" (O99; *cf.* S106). However, Geiger was adamant: "I told them that they could not eat in Ocala. They would have to eat someplace else. They couldn't eat in the bus station" (S109; *cf.* S99; O99; C94). When the petitioners persisted in their demand to be permitted to use the public facilities of the bus station and refused either to board the bus or leave the premises, Deputy and Sheriff Geiger placed them under arrest.

Deputy Geiger was candid in his description of his reasons for ordering all six persons to leave the terminal building: "All I knew is that they were all together, they were in this group, there was a possibility of violence, there were several people at the Bus Station and I wanted to get them outside so I could talk with them" (C93 to 94; *cf.* S95; O97 to 98). When interrogated as to the basis of his apprehension of violence arising from this "minor incident," Geiger described "information" he had received prior to the arrival of the bus in Ocala "that some man had been down previously making a statement that no more damn niggers would have, would eat here today" (O97); and further relied on "the atmosphere of that particular day, that

time * * *" (O98; *cf.* C98; C102; A95). Geiger, in fact, at one point specifically referred to *Owens'* conduct as providing the impetus for his actions: "Owens was a little angry so, at that time, to keep any other people from congregating and to prevent any trouble, I asked all of them to leave" (S96).

Not only did Geiger fail entirely to attribute his "apprehension" to any words or actions of the defendants (other than the simple fact of their presence), but in answer to a question posed on cross-examination as to the reason for requiring the defendants to board the bus after Owens, Penuel and Windsor departed, Geiger frankly described the compelling "danger" then existing: "If I had let these three stay there, the other three walking down the street turned around and seen them, in all probability they would have returned" (S105).

The State of Florida also called as a witness in all three prosecutions Sheriff Doug Willis of Monroe County, and Deputy Geiger's superior. Sheriff Willis was also at the scene because of "information" he had that "freedom riders" would be arriving in Ocala (S113; cf. O114; C111); he too observed the "scuffle" (S114; O114; C112) and helped to disperse the alleged participants (S114; O114; C114); he too directed the petitioners to leave the premises or board the bus (S115; O117; C115) and prohibited their reentry of the terminal (S115; O118; C126). Although Sheriff Willis' testimony to that extent supported that of Geiger, it added no significant details of the occurrence. Sheriff Willis also testified that Smith was not involved in any "fight" or "struggle" with anyone (S119); he testified that he did not see Callender "with his hand on anyone" (C120); and even testified that he did not see O'Connor in contact with Owens (O120), although he did see O'Connor's hands on Smith (C120). In fact, Sheriff Willis acknowledged that all he heard was "some voices in a jumble" (C113) and that, as to the "scuffle," "I couldn't tell just exactly what was going on" (O114); "I didn't see it well enough to see what actually took place" (S115).

The many gaps in the testimony of Sheriff Willis and Deputy Sheriff Geiger were filled by John Owens, one of the three local men identified by Willis and Geiger as being involved in the "scuffle," who testified for the State in all three prosecutions.

Owens testified that he and Penuel were inside the terminal and were walking toward the west door, intending to leave (S127; O127). As they approached that door, the petitioners Smith and O'Connor entered the terminal through the west door. What transpired then was frankly stated by Owens on direct examination:

> "Well, I was starting out the west door of the waiting room and I met the fellow, Smith at the door, opened the door and walked right in, and he walked into me and stepped on my foot, and then in moving or something, why, O'Connor, he come up from—well, there was a little commotion, I don't know just exactly, I would say I probably shoved Smith a little bit, or something and then O'Connor grabbed him by the arm, and it looked like he was trying to push him into me." (O127)
>
> "Yes, I was angry a little bit and started to shove him outside. I believe I asked him to go outside." (S121)
>
> See also C152.

Owens on several occasions acknowledged that he had "shoved" Smith (S127; S131; O121; O128), but despite persistent questioning he stated that he did not see the petitioner Callender touch anyone (C154); that his only physical contact with Smith was Smith's stepping on his foot and Owens' retaliatory shove (S127 to 128); and that O'Connor, in "grabbing" *Smith* by the arm when he was pushed by Owens, may have struck Owens' arm (O127), although he later acknowledged that he "wasn't sure" (O132). Owens also testified as to a "little shove" by O'Connor as the entire group was being ushered out of the building by Deputy Geiger (O132), although he acknowledged that Geiger was "pushing" the entire group out the door (O133).

The only other descriptions of the occurrence from the State's witnesses came from T. W. Penuel and J. A. Windsor, the remaining two local men involved in the "scuffle" (Both Penuel and Windsor testified against Smith; Windsor testified against Callender; neither was called in O'Connor.) Neither of those witnesses could describe any particular activity of any of the individual petitioners, although Penuel acknowledged that Owens seemed to have a "hold on" Smith (S135), and Windsor heard "Mr. Owens tell him to get out on the outside" (S139).

Petitioner Smith, the first of the petitioners to be tried, took the stand in his own defense. His testimony was not greatly at odds with that of the State's witnesses, except that he denied having stepped on Owens' toe. Smith testified rather that as he and O'Connor entered the bus terminal to eat (S142) (Smith then suffering from an ulcer (S143)) Owens blocked their entry into the Station (S142), advancing on them with his hands raised and saying "no niggers in this place" (S143). He did support Owens' statement that O'Connor and he backed up and that O'Connor put his hands on him (i.e., Smith) at that time (S143; S171).

On the basis of the testimony summarized above, the three petitioners were separately convicted in jury trials and sentenced as follows: Smith, 30 days and a $500.00 fine or in default of fine, an additional six months; O'Connor, $250 fine or, in default, 90 days; Callender, six months and a fine of $300, and in default of fine, an additional six months.

How the Federal Questions were Raised and Decided Below

Petitioners moved unsuccessfully at the completion of the evidence for directed verdicts (O137; S183; C201) because, *inter alia,* "the duty of the law enforcement officers [is] to protect an individual in the exercise of his constitutional rights, not to stop them from exercising them * * *" (S186). Motions for a new trial were made following the verdicts (O59; S56; C56) citing violations of the equal protection clause of the Fourteenth Amendment, 49 U. S. C., Section 316(d), and the Florida Bill of Rights as well as non-constitutional errors. The motions were denied.

On the petitioners' appeal, the Circuit Court of the Fifth Judicial Circuit of Florida in and for Marion County passed on the constitutional claims by rejecting them summarily and completely (O8; S6; C8).

The Florida District Court of Appeal, First District, denied certiorari (O75; S79; C77) and the Florida Supreme Court dismissed the appeals (O196; S196; C214) and denied the petition for rehearing (O179; S197; C215).

Reasons for Granting the Writ

The decision below conflicts with applicable decisions of this Court on important constitutional issues.

ARGUMENT

POINT I

The convictions below violate the constitutional guarantee of due process of law.

A. The convictions were totally unsupported by the evidence.

The petitioners were convicted below, because, in the language of the complaint, they allegedly "did unlawfully meet" with one another "to commit a breach of the peace" contrary to the provisions of Florida law.

The State of Florida does not formally attempt to question the petitioners' right to use the terminal facilities. Rather, the State's thesis is that the attempt to enter the terminal was clouded by an underlying criminal purpose to commit a breach of the peace.

Yet the record, viewed most favorably toward the State, reveals no evidence of any violation of law. Deputy Sheriff Geiger heard "loud words" (O87; C91) or "loud talk" (S72) from "6 or 7 people just inside the door [of the terminal]" (S92; cf. O87). What followed included a "shoving" incident between one of the petitioners and a local resident (C91; cf. O87) and an incident in which one of the petitioners possibly stepped on the toe of another local resident. This, in summary, is the extent to which the peace was threatened. The "possibility of violence" referred to by Deputy Geiger (C93-94) turns out to be whimsical in the absence of a single reference to an event even suggesting violence.

What tension was present was spawned by local area residents. This is clear even according to the State's version of the case. Deputy Geiger testified quite candidly:

> "Owens was a little angry so, at that time, to keep any other people from congregating and to prevent any trouble, I asked all of them to leave." (S96)

Owens himself acknowledges, "Yes, I was angry a little bit and started to shove him outside. I believe I asked him to go outside" (S121).

Further, whatever the source, the danger of violence or civil disturbance was wholly imaginary. When Deputy Geiger walked over to the scene of the "breach of the peace" he found that the burning issue was whether or not petitioner Smith would apologize to local resident Owens for having stepped on the latter's toes. (According to the testimony of petitioner Smith the entire incident arose when Owens blocked the entry of the group into the terminal.) Geiger characterized the scuffle as "a minor thing," hardly a sufficient basis upon which to find that the three petitioners met together to create a breach of the peace.

On the basis of such a record, the conviction is contrary to due process of law. *Thompson* v. *Louisville,* 362 U. S. 199. As in *Garner* v. *Louisiana,* 368 U. S. 157 and *Taylor* v. *Louisiana,* 370 U. S. 154, the evidence established simply that petitioners were peacefully exercising their lawful rights in violation of the wishes of local residents. Deputy Geiger gives away the entire charade when he reveals that he ordered the petitioners to reboard the bus so that the local residents involved in the "scuffle" who had left the scene would not return. Not only did the State fail to prove any breach of the peace during the height of the "minor thing" but the petitioners' arrests were admittedly grounded on an alleged fear that others would regard the use of the terminal facilities as a reason to cause trouble.

The State may not justify its supposed fears of violence by reliance upon the wrongdoing of those bent on destroying the constitutional rights of others. As this Court said last term in ***Wright*** v. ***Georgia,*** 373 U. S. 284, 293 "the possibility of disorder by others cannot justify the exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present." The wrongdoing of one cannot justify denying the rights of others. *Cooper* v. *Aaron,* 358 U. S. 1, affirming 257 F. 2d 33, 38-39 (8 Cir. 1958); *Watson* v. *City of Memphis,* 373 U. S. 526. We can say no more than was said by Judge BROWN in *Nesmith* v. *Alford,* 318 F. 2d 110, 121 (5 Cir. 1963):

> "* * * liberty is at an end if a police officer may without warrant arrest not the persons threatening violence, but those who are its likely victims merely because the person arrested is engaging in conduct which, though peaceful and legally and constitutionally protected, is deemed offensive and provocative to settled social customs and practices. When that day comes * * * the exercise of [First Amendment Freedoms] must then conform to what the conscientious policeman regards the community's threshold of intolerance to be."

It requires little subtlety to appreciate that the State's theory below, if sanctioned, could abruptly halt the exercise of constitutional rights since a finding of threatened violence—whatever the source of such violence—would justify preventive police action. Violence is thus honored, not condemned.

If State officers do not have the duty to ensure the protection of the rights of all within the State, then at the very least the State may not stand idly by and later prosecute those who exercise their rights because without police help such exercise might lead to violence.

On the present record there is no evidence of any wrongdoing by the petitioners. Here, as in *Wright* v. *Georgia*, 373 U. S. 284, 285, "The record is devoid of evidence of any activity which a breach of the peace statute might be thought to punish."

B. The Florida statute was, as applied to these petitioners, vague, uncertain and indefinite.

Section 870.02 of the Florida Statutes, as it was applied and interpreted below, is so vague as to violate well established principles of due process.

A statute that permits a conviction for unlawful assembly where even the State's witnesses can show nothing more than an apparent insult to local sensibilities actually leaves the job of legislating standards of conduct to the local policeman.

No other conclusion ensues from the facts in this case. The petitioners sought to use a bus terminal serving the public; they found the door to the facility effectively blocked by local residents and still managed to pursue their rights peaceably—even in the eyes of the State's witnesses.

What motivated Sheriff Geiger to conclude under these circumstances that the petitioners had committed a breach of the peace? Geiger had on the day in question heard someone make a statement that (as related at trial by Geiger) "no more damn niggers would have, would eat here today" (O97) and this, plus "the atmosphere of that particular day" (O98) caused "apprehension". When the incident, such as it was, occurred, Geiger could point to no disturbance of the peace caused by any petitioner. A statute that may be shaped according to the needs of the constabulary does not give fair notice of what human conduct is sought to be governed. As was said in *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what crimes are forbidden." And see *United States* v. *L. Cohen Grocery*, 255 U. S. 81, 89; *Connally* v. *General Const. Co.*, 269 U. S. 385; *Raley* v. *Ohio*, 360 U. S. 423.

Here the State of Florida has gone far beyond even the broad interpretations customarily given to the term breach of the peace, see *e.g.*, *Cantwell* v. *Connecticut*, 310 U. S. 296; *Edwards* v. *South Carolina*, 372 U. S. 229, and has permitted its unlawful assembly enactment to become a transparent device for extending its police power into constitutionally sacred ground.

Regrettably there are no reported decisions shedding light on §870.02 of the Florida Statutes. A pertinent law review article, "'Sit-In' Demonstrations: Are They Punishable in Florida?" 15 Univ. of Miami L. Rev. 123 (1960) cites no Florida decisions but sets down what it considers to be guidelines within which a "sit-in" is legal in Florida and beyond which a breach of the peace is committed by the demonstrators.* The authors believe that "an imminent danger of a riot or a breach of the peace" would justify the arrest of demonstrators who refuse to desist even if they themselves are innocent. Id. at 129. We cannot consider this view to be consistent with federal constitutional principles; see, *e.g., Wright* v. *Georgia,* 373 U. S. 284.* Nevertheless what Florida has done in the present case is even a graver threat to human liberty—it has sanctioned arrest and prosecution on the basis of no governing criteria whatever.

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*The Statute considered is §877.03, not 870.02, but the article's authors point out that the two sections cover much of the same ground. §877.03 states:

> "Breach of the peace; disorderly conduct—whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty of a misdemeanor, and subject to punishment as provided by law."

Further, where, as here, the actions obstructed by a vague and arbitrary enactment are truly acts of self-expression since they reassert the dignity and very humanity of the actors the proscription against vague restrictive penal laws must be at its strongest. *Cantwell* v. *Connecticut,* 310 U. S. 296, 308-311; *Scull* v. *Virginia,* 359 U. S. 344; *Watkins* v. *United States,* 354 U. S. 178; *Herndon* v. *Lowry,* 301 U. S. 242, 261-264.

POINT II

The arrests and convictions below constitute *de facto* enforcement of racial segregation in a bus terminal serving interstate commerce in violation of the Constitution and Federal Statutory Law.

There is little mystery connected to the curious turn of events which brings the three petitioners here as convicted criminals for wanting to use an interstate travel facility. This is a clear attempt by a State to enforce segregation through use of its routine criminal process.

The desire of local residents at the station to maintain the custom of segregation is not and cannot be questioned. The petitioners found a bus terminal in Ocala fully set up for the segregation of the races. Despite an attempt to suggest that no racial issue prevailed because of an earlier mixed use of the terminal (C96; O97; S99 to 100), separate facilities still existed (e.g., C91).

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*And see *Abernathy* v. *Alabama,* No. 575 this term.

The petitioners not only failed to gain access to the facility on an integrated basis but found that what they had really done was to "meet together to commit a breach of the peace". This Court has previously seen through such a flimsy and ingenuous ruse. If a law is used to enforce racial segregation it matters little what it is called. The present attempt to shape innocent conduct to fit the behavior pattern of the rowdy or the drunk cannot misdirect the eye from a segregated bus terminal.

Since the enforcement of racial segregation in facilities serving interstate commerce is a denial of equal protection of the laws* and a violation of a federal statute forbidding discrimination in facilities operated by interstate motor carriers, 49 U. S. C. §316(d)** the respondent has sought to accomplish the same result through the oppressive use of State criminal process.

This kind of federal question is always difficult because it raises the issue of the integrity of state action, beyond the usual issue of the conformity of the State to Constitutional principles. The exercise of Constitutional rights in areas where local hostility is great enough to shape the course of state action makes the necessity to face such questions overwhelming.

The present case is an example of utter failure to adhere to the principles of criminal justice. Not even the witnesses for the State can espouse juridical indignation but rather confess quite openly that the prosecution below

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**Bailey* v. *Patterson,* 369 U. S. 41; *Turner* v. *Memphis,* 369 U. S. 350; *Gayle* v. *Browder,* 352 U. S. 903, affirming 142 F. Supp. 707 (M. D. Ala. 1956); *Baldwin* v. *Morgan,* 287 F. 2d 750 (5 Cir. 1961); *Boman* v. *Birmingham Transit A.,* 280 F. 2d 531 (5 Cir. 1960).

***Boynton* v. *Virginia,* 364 U. S. 454, As to Article I, §8 of the Constitution see *Morgan* v. *Virginia,* 328 U. S. 373.

was based on "loud words" and a "minor incident." Such events—and the absence of any colorable basis for prosecution—indelibly mark the action of the State as the enforcement of racial segregation.

CONCLUSION

The convictions below, without evidence and devoid of any constitutional purpose, must fall. The issue is not simply the rights of these petitioners but the power of a state to circumvent the solemn command of the Constitution.

It is respectfully submitted that the petitions should be granted.

Carl Rachlin,
Floyd McKissick,
Charles Oldham,
Webster Sweet,
Ernest Finney,
and
Ernest Jackson,
Attorneys for Petitioners.

Geoffrey Gaulkin,
Benson D. Scotch,
Of Counsel.

APPENDIX A

Order and Judgment of the Trial Court (Re: *State of Florida v. Herbert Ebenezer Callender*)

In County Judge's Court
Marion County, Florida

◆

State of Florida
vs.
Herbert Ebenezer Callendar,
Defendant.

◆

Plea, Verdict, Judgment and Sentence

Plea: Not Guilty

Verdict: Guilty

Judgment: Guilty as charged

Sentence: It is considered, ordered and adjudged that Herbert Ebenezer Callender be confined to the Marion County Jail for a period of 6 months and pay a fine of $300.00, in default of payment of said fine he shall be confined to the County Jail for an additional period of 6 months.

Done, Ordered and Adjudged in open Court this 22 August 1961.

Lewis O. Myers, Jr.
(Seal)
County Judge

APPENDIX B

Order and Judgment of the Trial Court (Re: *State of Florida* v. *James Richard O'Connor*)

IN COUNTY JUDGE'S COURT
MARION COUNTY, FLORIDA

◆

STATE OF FLORIDA

vs.

JAMES RICHARD O'CONNOR,
Defendant.

◆

PLEA, VERDICT, JUDGMENT AND SENTENCE

PLEA: Not Guilty

VERDICT: Guilty

JUDGMENT: Guilty as charged

SENTENCE: It is considered, Ordered and adjudged that James Richard O'Connor is guilty as charged and that the defendant do pay to the State of Florida a fine of $250.00 which amount shall include costs, and in default of the payment of said fine that said defendant be confined in the County Jail of Marion County, Florida, for a period of 90 days and be employed at hard labor.

Done, Ordered and Adjudged in open Court this 17 July 1961.

LEWIS O. MYERS, JR.
(Seal)
County Judge

APPENDIX C

Order and Judgment of the Trial Court (Re: *State of Florida* v. *Leslie Lee Smith*)

IN COUNTY JUDGE'S COURT
MARION COUNTY, FLORIDA

◆

STATE OF FLORIDA

vs.

LESLEY LEE SMITH,
Defendant.

◆

PLEA, VERDICT, JUDGMENT AND SENTENCE

PLEA: Not Guilty

VERDICT: Guilty

JUDGMENT: Guilty as charged

SENTENCE: It is considered, Ordered and Adjudged that Lesley Lee Smith be confined to the Marion County Jail for a period of 30 days and pay a fine of $500.00; in default of payment of said fine he shall be confined to the County Jail for an additional period of 6 months.

Done, Ordered and Adjudged in open Court this 17 July 1961.

LEWIS O. MYERS, JR.
(Seal)
County Judge

APPENDIX D

Order of the Circuit Court of the Fifth Judicial Circuit of Florida in and for Marion County Granting the State's Motion to Dismiss (Re: *James O'Connor v. State of Florida*)*

(Filed—August 24, 1962)

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR MARION COUNTY

◆

JAMES O'CONNOR,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

◆

APPEAL FROM THE COUNTY JUDGE'S COURT
IN AND FOR MARION COUNTY.

This cause on the 6th day of August, 1962, came on to be heard upon Appellee's Motion to Dismiss Appeal for failure of the Appellant to perfect his appeal in accordance with the requirements of the Florida Appellate Rules. Appearing at the hearing for the Appellee, STATE OF FLORIDA, was the State Attorney of the Fifth Judicial Circuit of Florida, Gordon G. Oldham, Jr., and appearing for the Appellant, JAMES O'CONNOR, was his attorney, Ernest D. Jackson, Sr. At said hearing the Appellant's attorney stated that he had petitioned the court for an additional period of time to file his brief, the time for filing Appellant's brief under Rule 6.11 (b) being within thirty days after the filing of the transcript of record. Under Rule 3.7 (d) additional time may be granted for filing of briefs, provided there is a petition and an appropriate court order extending the time. A Motion for Extension of Time to File Brief in the above styled case does not appear in the record. The record fails to reflect any order from any court granting additional time for Appellant to file his brief under Rule 3.7 (d), or as provided by Rule 6.61. The brief in the above entitled cause should have been filed on or before the 5th day of October, 1961, which is thirty days after the transcript of record was filed by the Appellant on the 5th day of September, 1961. The records reflect that the Appellant's brief was filed on the 9th day of October, 1961, a period of four (4) days later than the maximum time under Rule 6.11 (b) of the Florida Appellate Rules.

Appellant's Notice of Appeal omits the book and page number of the public records in which the order, judgment or decree is appealed from. Florida Appellate Rule 3.2 (c) states that the Notice of Appeal shall state the book and page number of public records in which it is recorded. In applying Florida Appellate Rule 6.1 and Rule 6.4 with Florida Appellate Rule 3.2, it is the Court's belief that the Notice of Appeal in the above styled case should state the book and page number of the judgment which is appealed.

On two previous occasions the Appellee, through its attorney, has moved to dismiss this appeal for failure of Appellant to follow the Florida Appellate Rules. On the first occasion Appellant had served the County Prosecuting Attorney with all documents, rather than the State Attorney

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*Identical in the Smith case.

of the Fifth Judicial Circuit, State of Florida, who is counsel for the State in the Circuit Court. At said hearing, as reflected by the order in the above styled cause, it was the Court's opinion that the State Attorney should have been served rather than the County Prosecuting Attorney. However, in fairness to the Appellant, said Court denied said motion to dismiss and gave the Appellant additional time to serve the proper party, the State Attorney of the Fifth Judicial Circuit of the State of Florida, Appellant, rather than serve the State Attorney as directed in said order, served the Assistant State Attorney of the Fifth Judicial Circuit of the State of Florida, and once again, this Court denied the motion to dismiss by Appellee and gave the Appellant additional time to serve the proper party, the State Attorney of the Fifth Judicial Circuit of the State of Florida.

It is the opinion of the Court that Appellant has neglected and failed to comply with the appropriate appellate rules; that such non-compliance has been flagrant, evidencing either ignorance of the rules or an indifference to a conscientious effort to effect compliance. It is now, therefore

ORDERED, ADJUDGED AND DECREED that the above Appeal be and the same is hereby dismissed under Florida Appellate Rule 6.13 for Appellant's failure to prosecute this appeal as required by the rules of appellate procedure.

However, through an abundance of caution, in order that the rights of the Appellant may not be unduly prejudiced, the Court has examined the record and briefs tendered by the Appellant herein and finds his appeal to be without substantial merit. It is further

ORDERED, ADJUDGED AND DECREED that the Clerk of the Circuit Court of the Fifth Judicial Circuit of Florida, in and for Marion County, shall file with the Clerk of the trial court a certified copy of this Order of Dismissal.

DONE AND ORDERED at Ocala, Marion County, Florida, this 24th day of August, A.D. 1962.

/s/ D. R. SMITH,
Circuit Judge.

I HEREBY CERTIFY that on the 24th day of August, 1962, I mailed a copy of this Order to each of the below addressees:

/s/ R. D. SMITH,
Circuit Judge.

Addressees:

HON. GORDON G. OLDHAM, JR.
State Attorney, Fifth Judicial Circuit
Kilgore Building
Leesburg, Florida.

MR. ERNEST D. JACKSON, SR.
410 Broad Street, Suite #208
Attorney at Law
Jacksonville 2, Florida.

APPENDIX E

Order of the Circuit Court of the Fifth Judicial Circuit of Florida in and for Marion County Granting the State's Motion to Dismiss (Re: *Herbert Ebenezer Callender v. State of Florida*)

(Filed—August 24, 1962)

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR MARION COUNTY

◆

HERBERT EBENEZER CALLENDER,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

◆

APPEAL FROM THE COUNTY JUDGE'S COURT, IN AND FOR
MARION COUNTY

This cause, on the 6th day of August, 1962, came on to be heard upon Appellee's Motion to Dismiss Appeal for failure of the Appellant to perfect his appeal in accordance with the requirements of the Florida Appellate Rules. Appearing at the hearing for the Appellee, State of Florida, was the State Attorney of the Fifth Judicial Circuit of Florida, Gordon G. Oldham, Jr., and appearing for the Appellant, Herbert Ebenezer Callender, was his attorney, Ernest D. Jackson, Sr.

Appellant's Notice of Appeal omits the book and page number of the public records in which the order, judgment or decree is appealed from. Florida Appellate Rule 3.2 (c) states that the Notice of Appeal shall state the book and page number of the public records in which it is recorded. In applying Florida Appellate Rule 6.1 and Rule 6.4 with Florida Appellate Rule 3.2, it is the Court's belief that the Notice of Appeal in the above styled case should state the book and page number of the judgment which is appealed.

On two previous occasions the Appellee, through its attorney, has moved to dismiss this appeal for failure of Appellant to follow the Florida Appellate Rules. On the first occasion Appellant had served the County Prosecuting Attorney with all documents, rather than the State Attorney of the Fifth Judicial Circuit, State of Florida, who is counsel for the State in the Circuit Court. At said hearing, as reflected by the order in the above styled cause, it was the Court's Opinion that the State Attorney should have been served rather than the County Prosecuting Attorney. However, in fairness to the Appellant, said Court denied said motion to dismiss and gave Appellant additional time to serve the proper party, the State Attorney of the Fifth Judicial Circuit of the State of Florida. Appellant, rather than serve the State Attorney as directed in said order, served the Assistant State Attorney of the Fifth Judicial Circuit of the State of Florida, and once again, this Court denied the motion to dismiss by Appellee and gave the Appellant additional time to serve the proper party, the State Attorney of the Fifth Judicial Circuit of the State of Florida.

It is the opinion of the Court that Appellant has neglected and failed to comply with the appropriate appellate rules; that such non-compliance has been flagrant, evidencing either ignorance of the rules or an indifference to a conscientious effort to effect compliance. It is now, therefore

Ordered, Adjudged and Decreed that the above Appeal be and the same is hereby dismissed under Florida Appellate Rule 6.13 for Appellant's failure to prosecute this appeal as required by the rules of appellate procedure.

However, through an abundance of caution, in order that the rights of the Appellant may not be unduly prejudiced, the Court has examined the record and briefs tendered by the Appellant herein and finds his appeal to be without substantial merit. It is further

Ordered, Adjudged and Decreed that the Clerk of the Circuit Court of the Fifth Judicial Circuit of Florida, in and for Marion County, shall file with the Clerk of the trial court a certified copy of this Order of Dismissal.

Done and Ordered at Ocala, Marion County, Florida, this 24th day of August, 1962.

/s/ D. R. Smith,
Circuit Judge.

APPENDIX F

Petition for Rehearing Following Order of the Circuit Court of the Fifth Judicial Circuit of Florida (Re: *Herbert Ebenezer Callender v. State of Florida*)*

(Filed—September 10, 1962)

In the Circuit Court of the Fifth Judicial Circuit of Florida, in and for Marion County

◆

Herbert Ebenezer Callender,
Appellant,
vs.
State of Florida,
Appellee.

◆

Appeal from County Judge's Court, in and for Marion County

To the Honorable Judges of the Circuit Court of the Fifth Judicial Circuit of Florida, in and for Marion County:

Petitioner, Herbert Ebenezer Calender, files this, his petition for rehearing, respectfully requesting this Honorable Court to reconsider its Order of Dismissal filed herein on August 24, 1962. As grounds for rehearing, he respectfully suggests the following:

---

*Petitions in *Smith* and *O'Connor* are identical.

1. The Court apparently overlooked Florida Appellate Rule 6.1 which provides as follows:

> "Appeals and criminal cases to the Supreme Court, the District Courts of Appeal and to the Circuit Courts (including appeals from Municipal Courts), shall be prosecuted in accordance with Part VI of these rules and, except as herein stated, with such provisions of other parts of these rules as are not inconsistent with the provisions of Part VI. As amended March 19, 1958, effective July 1, 1958."

2. The Court was apparently misled and erroneously applied Florida Appellate Rule 3.2 of Part III, which set forth the content of Notice of Appeal filed in Civil actions, instead of following Florida Appellate Rule 6.4 of Part VI, which does not require the book and page number of the book in which the judgment is recorded to be set forth in the Notice of Appeal filed in Criminal cases.

3. The Court apparently ignored or overlooked Florida Appellate Rule 3.9, sub-paragraph "c" of Part III, which has no counterpart in Part VI of the rules which provides in part:

> Time For. Every motion on behalf of an appellee to quash or dismiss an appeal, to strike the record or any portion thereof shall be filed, and a copy thereof served upon the opposite party, on or before the day the appellee is required to file his brief.

4. The Court apparently overlooked the fact that the State in this case did not file its Motion to Dismiss until after the time for filing their brief had expired for more than four (4) days, and overlooked the fact that the filing of the brief and the time it was filed by the Appellant was

in agreement with the Prosecuting Attorney and that the Motion for extension of time was filed merely as a precautionary measure which led to the subsequent agreement between the petitioners and the State to avoid the necessity of a hearing.

Wherefore, petitioner prays that the Court grant a rehearing in this matter, which would allow Counsel for Appellants to examine the records before the Court and to present any law touching upon the matters involved herein. This action is necessary because of the Court's Order of Dismissal which indicated that the dismissal is also based upon a consideration of the case on its merits.

/s/ Ernest D. Jackson, Sr.,
Ernest D. Jackson, Sr.,
Attorney for Petitioner,
410 Broad Street, Suite No. 208
Jacksonville, Florida.

I Hereby Certify that a copy hereof has been furnished to Gordon G. Oldham, Jr., State Attorney, Room No. 1, Kilgore Building, Leesburg, Florida, by U. S. Mail, this 8th day of September, 1962.

/s/ Ernest D. Jackson, Sr.,
Attorney.

APPENDIX G

Orders of the Florida Supreme Court Dismissing Appeals*

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1963
MONDAY, OCTOBER 21, 1963

◆

HERBERT EBENEZER CALLENDAR,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

◆

Case No. 32,648

This cause coming on this day for consideration, it is ordered ex mero motu that the appeal filed in this cause in the District Court of Appeals, First District of Florida, on April 9, 1963, be and the same is hereby dismissed.

A True Copy

TEST:

GUYTE P. McCORD,
Clerk Supreme Court.

---

*The orders are identical in all cases.

APPENDIX H

Orders of the Florida Supreme Court Denying Petitions for Rehearing*

IN THE SUPREME COURT OF FLORIDA
JULY TERM A.D. 1963
TUESDAY, DECEMBER 3, A.D. 1963

◆

HERBERT EBENEZER CALLENDAR,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

◆

CASE NO. 32,648

On consideration of the Petition for Rehearing filed by Attorney for Appellant,

IT IS ORDERED by the Court that the said petition be, and the same is hereby, denied.

A TRUE COPY,

ATTEST:

GUYTE P. McCORD,
Clerk Supreme Court.

(I have today mailed to the Clerk of the District Court of Appeal, First District, Order of October 21, 1963, dismissing appeal in the above cause.)

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*The orders are identical in all cases.

Calley
Fla.

PHONE ELGIN 4-0467 - 4-0468

ERNEST D. JACKSON, SR.
ATTORNEY AND COUNSELLOR-AT-LAW
SUITE 208 — MASONIC TEMPLE BUILDING
410 BROAD STREET
JACKSONVILLE 2, FLORIDA

July 12, 1961

Carl Rachlin, Esquire
38 Park Row
New York 38, New York

Dear Sir:

Pursuant to our telephone conversation in regards to the cases involving the Freedom Riders in Ocala, Florida, may I advise that the status of the cases can be explained as follows;

Rev. Leslie Smith has been tried and convicted for unlawful assembly. There is a remaining charge against him alleging that he failed to obey an officer. Mr. James O'Conner has been tried and convicted on the charge of unlawful assembly, and there remains a charge against him, alleging that he failed to obey an officer.

$500.00 or 6 mos. + 30 days

250.00
or 90 days

Both Rev. Leslie Smith, and Mr. James O'Conner are to appear before the County Judge on July 17, 1961, for sentencing. If it is the desire of Core, to appeal these cases it will be necessary to post an appellant bond, which probably will be in the neighborhood of one thousand dollars ($1,000.00), each. I am mindful of the fact that there are two thousand dollars ($2,000.00) already deposited as bond for these two defendants; however, unless the County drops the remaining two charges of failing to obey an officer, it will be necessary to keep five hundred dollars, ($500.00) each on these two charges. This would mean that each of the defendants would have to bring with them approximately five hundred dollars ($500.00) each, to post the additional bond.

It will be necessary for me to file a notice of appeal at the time my motion for a new trial, is denied, and the court has sentenced the defendants; otherwise an appellant bond can not be set by the judge. It is my opinion that these cases have an appellant value in that the bare issue raised is whether or not local police authorities are required under law to protect individuals in the peaceful pursuit, and enjoyment of their constitutional rights or whether the police officers are priviledged to arrest individuals who attempt to peacefully pursue and enjoy their constitutional rights, under a charge of unlawful assembly in the State of Florida, simply because a few race bating agitators attempted to forcefully prevent these peaceful individuals from pursuing their Constitutional Rights, in a non-violent manner. The County is taking the position that the bus terminal facilities are already integrated, and admit that the defendant have a right to peacefully use all of the facilities of the terminal; however, the county argue that the members of Core are organized to forcefully use the busterminal facilities in complete disregard of the safety of others. The county argues that the action of the Freedon Riders, is in violation of Florida Statute 870.02, Unlawful Assemblies,

> " If three or more persons meet together to commit a breach of the peace, or to do any other unlawful act, each of them shall be punished by imprisonment not exceeding six months, or by fine, not exceeding five hundred ($500.00) dollars."

There was no testimony or evidence in the case showing that any member of Core attempted to use force. There was some evidence that one of the agitators shoved Rev. Smith; however, the witness testify that Rev. Smith backed up toward the door and Mr. O'Conner took Rev. Smith by the arm and told him to go in a different direction to the restaurant. The same witness further testified that his arm and Mr. O'Conner's arm came in contact with each other. The witness first testified that he did not touch Mr. O'Conner nor did Mr. O'Conner touch him. The evidence is clear that no member of Core attempted to strike anyone, and even the officers testified that no one was talking in a loud boistrous voice. The state has argued that the officers told the defendants to get back on the bus and told the agitators to move off the premises of the bus terminal. The agitators did move off the premises of the bus but the defendants refused to get back on the bus and instead requested that they be permitted to go to the restaurant to eat. The officers and the other witnesses changed their testimonies in the O'Conner case and it will be necessary for me to get the testimony of the first case as transcribed by a court reporter I employed in the first case. The cost for this reporter and the testimony is approximately two hundred ($200.00) dollars. The testimony in all three cases cost approximately four hundred fifty ($450.00) dollars or a total of approximately six hundred fifty ($650.00) dollars.

The total cost for the appeals is approximately the amount outlined below.

Filing fee-----------------------------	75.00	
Transcription of testimony-------------	650.00	Pd
Preparation of record------------------	60.00	Pd
Briefs (approximately)-----------------	400.00	– within 2 wks
Attorney fee (approximately) (not fixed)	500.00	– within 2 wks
	1,685.00	
apellate fee to apellate court —	50.00	Pd (at $25.00 each)

D.J as per phone call from EDJ 7/22/61

I am already obligated to pay two hundred dollars ($200.00) to the court reporter I employed to take the testimony in the first hearing and as things turned out, I was correct in having him present. Otherwise, the County would be free to build their case by varying the testimony. Icould not take this chance.

I agreed to try these cases on a retainer of two hundred fifty dollars ($250.00) plus; I have been out of my office approximately three days already and will probably be out of my office two more days because I am to defend Mr. Callendar on or about August 21,1961 and argue the motions for new trial on July 17, 1961. If Core can spare four or five hundred dollars ($400.00 or $500.00) as a total fee for the trial of these three cases it would be appreciated; however, if this is impossible, I shall expect you to do your best. — Pd.

Ocala is approximately one hundred miles from Jacksonville which required my traveling over 200 miles by car each day.

It is necessary that I order the testimony within ten days in order to be sure of its preparation by August 21st when I am to try Mr. Callendar. If any further information is needed pleas feel free to call upon me and the same will be forthcoming.

May I at this time thank you for your cooperation in this matter.

Respectfully yours,

Ernest D Jackson Sr.
Ernest D. Jackson Sr.

October 31, [illegible]

Robert D. Jackson, Esq.
Suite 306
418 Broad Street
Jacksonville, Florida

Re: Smith, Callender & O'Connor

Dear Mr. Jackson:

I have received the transcripts in the above cases. What is our timetable and how should we proceed? Let me hear from you on this.

Regards,

Sincerely,

CR:sw

CARL RACHLIN

PHONE ELGIN 4-0467 - 4-0468

ERNEST D. JACKSON, SR.
ATTORNEY AND COUNSELLOR-AT-LAW
SUITE 208 — MASONIC TEMPLE BUILDING
410 BROAD STREET
JACKSONVILLE 2, FLORIDA

RECEIVED
NOV 13 1962
ECK & ELIAS

November 10, 1962

Carl Rachlin, Esquire
280 Broadway
New York 7, New York

Re: Smith, Callendar and
O'Conner

Dear Sir:

The Records in the above styled causes were filed today in District Court, with a copy being sent to Richard W. Ervin, Attorney General, Tallahassee, Florida.

These cases will be set for hearing by the Judge of the District Court, until then we are at a standstill. As soon as these cases are set you will be notified.

Very truly yours,

Ernest D. Jackson Sr. LH
Ernest D. Jackson, Sr.

/lh

DISTRICT COURT OF APPEAL
FIRST DISTRICT
TALLAHASSEE, FLORIDA

RAYMOND E. RHODES
CLERK

March 25, 1963

Honorable John F. Nicholson
Clerk Circuit Court
Marion County Court House
Ocala, Florida

Re: Herbert Ebenezer Callendar
v. State of Florida
Docket No. B-13

James Richard O'Connor
v. State of Florida
Docket No. B-14

Leslie Smith v.
State of Florida
Docket No. B-15

Dear Mr. Nicholson:

We have been directed by the Court to issue Mandates in the above Petitions for Writ of Certiorari which are enclosed herewith, together with certified copies of the opinions of the Court.

Yours very truly,

RAYMOND E. RHODES, CLERK

By ______________________
Deputy Clerk

Enc. 6
cc: Honorable Ernest D. Jackson, Sr.
Attorney at Law
410 Broad Street
Jacksonville, Florida

Honorable George R. Georgieff
Assistant Attorney General
Capitol Building
Tallahassee, Florida

PHONE ELGIN 4-0467 - 4-0468

Jackson [redacted]
Attorneys-At-Law
SUITE 205 — MASONIC TEMPLE BUILDING
410 BROAD STREET
JACKSONVILLE 2. FLORIDA

RECEIVED
MAR 28 1963
VLADECK & ELIAS

March 27, 1963

Carl Rachlin
Counsellor At Law
280 Broadway
New York 7, New York

Re: Herbert Ebenezer Callender
James Richard O'Connor
Leslie Smith

Dear Sir:

Enclosed are copies of proceedings filed in behalf of the above named clients. As you will see, Petition for Writ of Certiorari was denied on February 26, 1963. On March 13, 1963, Petition for Rehearing was filed. Petition for Rehearing was denied on March 25, 1963.

Please advise me immediately on the next step that should be taken.

Very truly yours,

Ernest D. Jackson, Sr.
Ernest D. Jackson, Sr.

Enclosures

3650

re Ξ

[illegible] to James Carey

Dear Mr Jackson

Thank you for your letter of the 27th inst.

(a) what is the next step in appeal under Fla. law

(b) what is your estimate of the cost? Regards

March 28, 1963

Ernest D. Jackson, Sr., Esq.
410 Broad Street
Jacksonville 2, Florida

Re: Callender, O'Connor, Smith v.
State of Florida
Our File No. 1650

Dear Mr. Jackson:

Thank you for your letter of the 27th.

(a) What is the next step in appeal under Florida law?

(b) What is your estimate of the cost?

Regards,

CARL RACHLIN

CR:cy
cc: Mr. James Farmer
Mr. Gordon Carey

[illegible] Appeal
First District
Tallahassee, Florida

[illegible] E. Rhodes
Clerk

April 29, 1963

Honorable Ernest D. Jackson, Sr.
Attorney at Law
410 Broad Street, Suite #208
Jacksonville, Florida

Re: Transcripts of Record in Cases:
O'Connor v. State
Callendar v. State
Smith v. State

Dear Mr. Jackson:

Your Directions to the Clerk in preparing Transcri
of Record in the above cause has been received.

Pursuant to Rule 6.9a and b, an original and
copies of the record have been prepared. Within the
(40) day period from the filing of the Notice of App
the original will be forwarded to the Supreme Court o
Florida and I am forwarding to you herewith two (2) cop

Please send me your check in the amount of $60
which is $1.00 per page for the original and two (2) copi

Yours very truly,

Raymond E. Rhodes

[illegible]
[illegible]

Ernest D. Jackson
Attorney-At-Law
Suite 205, Masonic Temple Building   Phone Elgin 4-[illegible]
Jacksonville 2, Florida

RECEIVED
MAY - 2 1963
LADECK & ELIAS

May 1, 1963

Mr. Carl Rachlin
Attorney-at-Law
280 Broadway
New York 7, N. Y.

Re: Callender, O'Connor, Smith
v. State of Florida. File No. 36

Dear Sir:

Enclosed is a copy of a letter from the District Court of Appeal regarding the Appeal Records in the above styled cases.

The Balance of $601.00 is due and payable immediately to the District Court of Appeal.

May we hear from you immediately upon receipt of this letter.

Very truly yours,

Ernest D. Jackson, Sr.

Ernest D. Jackson, Sr.

Enclosure

Original letter
sent by hand to
Gordon Carey
on 5/2/63

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1963
MONDAY, OCTOBER 21, 1963

LESLIE LEE SMITH, :
Appellant, :
vs. : CASE NO. 32,649
STATE OF FLORIDA, :
Appellee. :
:

This cause coming on this day for consideration, it is ordered ex mero motu that the appeal filed in this cause in the District Court of Appeal, First District of Florida, on April 9, 1963, be and the same is hereby dismissed.

A True Copy
TEST:
Guyte P. McCord
Clerk Supreme Court.

[illegible]

[illegible],
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

CASE NO. [illegible]

This cause coming on this day for consideration, it is ordered ex mero motu that the appeal filed in this cause in the District Court of Appeal, First District of Florida, on April 9, [illegible], be and the same is hereby dismissed.

A True Copy
Test:
Guyte P. McCord
Clerk Supreme Court.

PHONE ELGIN 4-0467 - 4-0468

Ernest D. Jackson, Sr.
[redacted]

Jackson [redacted]

Attorneys - At - Law

SUITE 208 — MASONIC TEMPLE BUILDING
410 BROAD STREET
JACKSONVILLE 2, FLORIDA

October 25, 1963

Mr Richard Haley
Congress of Racial Equality
38 Park Row
New York 38, New York

Re: Callendar, O'Connor, Smith
v. State of Florida
File No. 3650

Dear Mr. Haley:

Enclosed are copies of the decision rendered on October 21, 1963 regarding the above mentioned people. As you probably note, an opinion was not written.

Our next step is to file a Petition in the Supreme Court of the United States and certify the Record in all three cases to said Court. Preparing the record in these cases will take sometime which will necessitate our beginning immediately to complete this work. Certification of these records will probably cost around $600.00, same as before, but in order to save you a part of this fee, we will prepare the records ourselves and just let the Court certify the same, which will ~~probab~~ly save you approximately $200.00, leaving a balance of $400.00 to be paid by you all.

As I said before this work should be started immediately, so the sooner you send the money the better. I would also appreciate receiving another payment on attorney fees.

An immediate reply is appreciated.

Very truly yours,

Ernest D. Jackson, Sr.

Ernest D. Jackson, Sr.

Enclosure

Ernest D. Jackson
Attorney-At-Law
Suite 208, Masonic Temple Building Phone Elgin 4-0487
Jacksonville 2, Florida

RECEIVED
NOV 6 1963
VLADECK & ELIAS

November 4, 1963

Carl Rachlin
Counselor at Law
280 Broadway
New York 7, New York

Re: Callendar, O'Connor, Smith
v. Florida.
File No. 3650

Dear Sir:

Petition for Rehearing was filed today in each of the above cases.

After reading the revised rules, it is my thinking that these cases should be taken to the United States Supreme Court by way of Notice of Appeal instead of Writ of Certiorari.

The time limit in either case is ninety days after a decree or judgment has been entered.

The records will be forwarded to the Clerk of the Supreme Court for certification immediately upon receipt of the $400.00.

Vh

cc Mr Haley

Very truly yours,

Ernest D. Jackson, Sr. eh

Ernest D. Jackson, Sr.

Dear Mr Jackson
Thank you for your letter of the 4th inst. Mr Haley is sending you the check. Please understand that we are thereby taking some of the load off your shoulders; the draft of a petition or appeal, as the case may be, will be sent to you

for your thoughts: thanks for all you have done

Sincerely

October [illegible], [illegible]

[illegible]
[illegible]
[illegible]

Re: [illegible] v. [illegible]
[illegible]

Dear Mr. [illegible]:

Mr. [illegible] has turned over to me your letter of October [illegible] [illegible]

I have [illegible] [illegible]

I look forward to hearing from you soon.

Sincerely,

cc: [illegible]
[illegible] [illegible]

November 6, 1963

Ernest D. Jackson, Esq.
Suite 208, Masonic Temple Building
Jacksonville 2, Florida

Re: Callender, O'Connor, Smith
v. Florida
File No. 3650

Dear Mr. Jackson :

Thank you for your letter of the 4th instant. Mr. Haley is sending you the check.

Please understand that we are merely taking some of the load off your shoulders. The draft of a petition, or appeal, as the case may be, will be sent to you for your thoughts.

Thanks for all you have done.

Very truly yours,

Carl Rachlin

CR:s
cc: Mr. Haley

November 29, 1963

Ernest D. Jackson, Sr., Esq.
Suite 208, Masonic Temple Bldg.
410 Broad Street
Jacksonville 2, Florida

Dear Mr. Jackson:

I have not heard from you with reference to the O'Connor case. Is there something wrong?

Please advise me.

Sincerely yours,

CR/hm

CARL RACHLIN

PHONE ELGIN 4-0467 - 4-0468

Ernest D. Jackson, Sr.
[redacted]

Jackson [redacted]

Attorneys - At - Law

SUITE 208 — MASONIC TEMPLE BUILDING
410 BROAD STREET
JACKSONVILLE 2, FLORIDA

RECEIVED
DEC [illegible]
VLADECK & EL

December 6, 1963

Carl Rachlin, Esquire
280 Broadway
New York 7, N. Y.

Callendar, O'Connor, Smith v.
Florida.
File No. 3650

Dear Mr. Rachlin:

Enclosed are copies of the Order denying Petition for Rehearing in each of the above cases.

We are somewhat puzzled over your letter of November 29, 1963. The same procedures are taken in each of the cases; however, if there is something definite you would like to know about O'Connor's case, please advise us of the same.

Very truly yours,

Ernest D. Jackson, Sr. eh

Ernest D. Jackson, Sr.

~~please photo copy~~
~~send to Galenback~~

EDJ/lh

Enclosures- 3

PHONE ELGIN 4-0467 - 4-0468

Ernest D. Jackson, Sr.
[redacted]

Jackson [redacted]
Attorneys - At - Law
SUITE 208 — MASONIC TEMPLE BUILDING
410 BROAD STREET
JACKSONVILLE 2. FLORIDA

December 10, 1963

Carl Rachlin, Esquire
280 Broadway
New York 7, N. Y.

Re: Callendar, O'Connor, Smith
v. Florida
File No. 3650

Dear Sir:

Enclosed are the Transcript of Records for the above named persons that have been certified by the Supreme Court of Florida to the United States Supreme Court.

Very truly yours,

Ernest D. Jackson, Sr.
Ernest D. Jackson, Sr.

December 13, 1963

Justin Golenbock, Esq.
60 East 42nd Street
New York, New York

Dear Jud:

I am sending you herewith the records in the Callender, et al v. Florida case., I think you will find them interesting cases. After you have read them, we can discuss whether they should go up on appeal or via certiorari.

With kindest regards.

Sincerely,

CR:cr
encs.

CARL RACHLIN

GOLENBOCK AND BARELL
60 EAST 42ND STREET
NEW YORK 17, N.Y.

MARTIN C. BARELL
JUSTIN M. GOLENBOCK
SEYMOUR KLEINMAN
SEYMOUR SHAINSWIT
DONALD D. SHACK
HENRY C. SHAYS
MARVIN B. TEPPER
ARNOLD RAYNOR

MARTIN W. FELCHER
MARTIN I. BRESLER
LEONARD W. WAGMAN
ERNEST WALTON
NORMAN J. MENELL
C. DANIEL CHILL
MICHAEL L. FRIEDMAN
JOEL ROTHENBERG

YU 6-3300
AREA CODE 212
CABLE ADDRESS "GOLEGAL"

December 24th, 1963

RECEIVED
DEC 2
VLADECK & ELIAS

Carl Rachlin, Esq.
Messrs. Vladeck and Elias
280 Broadway
New York 7, New York

Re: Callendar et al v Florida

Dear Carl:

I tried to get you today (Friday) to tell you about our decision in the above case, but unfortunately found that you were gone for the entire afternoon. Because I am leaving for a short but belated vacation, I did want to send this letter to you to give you time to obtain a substitute in this matter.

Unfortunately, from the looks of our litigation calendar during the next two months, I am afraid that we will be unable to devote the time and attention which I think this case so rightfully deserves. I delayed somewhat in the hopes that I would find some ample space in the program of our office or any of the people in the office to enable us to contribute whatever we could in connection with the preparation of this matter. However, in truth we are very seriously handicapped by reason of an unexpected rash of litigations and appeals which are coming up in the next few months, and I do not want to undertake anything which could not get the full benefit of my time and effort.

With a sense of deep regret, I will have my office return to you this very interesting file, so that you can perhaps while I am away find someone else who might be able to do the work. If you cannot, I will be most happy to undertake to either insure that someone in my office, with assistance from me, do the work, or that I will obtain someone else to do the work on behalf of Core.

Best personal regards to you, and best wishes for a happy new year,

Sincerely,

Jack Golenbock

jmg/k
by hand with file

RECEIPT OF FILE ACKNOWLEDGED

____

Ernest D. Jackson
Attorney-At-Law
Suite 208, Masonic Temple Building   Phone Elgin 4-0467
Jacksonville 2, Florida

Rec'd
1/16/64

January 14, 1964

Carl Rachlin, Esquire
280 Broadway
New York 7, N. Y.

Re: Callendar, O'Connor, Smith
v. Florida. File No. 3650

Dear Mr. Rachlin:

We have not heard from you relative to the above cases and the time for appeal is drawing close, in fact the deadline is January 20, 1964 (90 days from October 21, 1963).

Please advise us of the progress you have made in these cases.

Very truly yours,

Ernest D. Jackson, Sr. lh

Ernest D. Jackson, Sr.

EDJ/lh

LAW OFFICES
IRVING R. M. PANZER
1735 DE SALES STREET, N. W.
WASHINGTON 6, D. C.

TELEPHONE
STERLING 3-3391

MAR 2 REC'D

February 27, 1964

Carl Rachlin, Esq.
280 Broadway
New York, N. Y.

Dear Carl:

I presented the extension of time in Callender v. Florida to the Supreme Court today, and the clerk has just called (5:00 p.m.) to say that the extension has been granted. So you have until April 13 to file. Please call Benson Scotch and tell him.

As I'm sure you know, you are now required to notify the other side, under Supreme Court Rule 34(4).

Incidentally, I have run up some expenses in these CORE matters, such as taxicabs today to and from the Supreme Court. I'm not asking for any fee, but can I get my expenses back?

Sincerely,

Irv

Irving R. M. Panzer

IRMP/mn

Dear Irv
thanks for your
help. Send me
a bill for your expenses.
I hope to see you soon
Regards to Sue

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

February 28, 1964

MAR 2 REC'D

Carl Rachlin, Esquire
165 W. 46th Street
New York, N. Y.

RE: CALLENDER, ET AL. v. FLORIDA

Dear Mr. Rachlin:

Your application for an extension of time in which to file a petition for writ of certiorari in the above cause was presented to Mr. Justice Black, who on February 27th signed an order extending your time to and including April 13, 1964.

A copy of Mr. Justice Black's order is enclosed and you should advise your adversary of the entry of this order.

Very truly yours,

JOHN F. DAVIS, Clerk

By Michael Rodak

Michael Rodak, Jr.
Assistant

MRjr:rlf
Encl.

cc: Irving R. M. Panzer, Esq.
Benson D. Scotch, Esq.
Geoffrey Gaulkin, Esq.

March 2, 1964

Irving R. M. Panzar, Esq.
1735 De Sales Street, N.W.
Washington 6, D. C.

Dear Irv:

Thanks for your help. Send me a bill for your expenses.

I hope to see you soon.

Regards to Sue,

CR/bs

CARL RACHLIN

COPY

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON 25, D. C.

June 1, 1964

JUN 2 1964

The Honorable James W. Kynes
Attorney General of Florida
Tallahassee, Florida

RE: CALLENDER, ET AL. v. FLORIDA
No. 996, October Term, 1963

Dear Sir:

A petition for writ of certiorari was filed in this Court on April 13, 1964, in the above-entitled case, to review the orders of the Supreme Court of Florida (Nos. 32648, 32649, and 32650), dated October 21, 1963. Our records indicate that you were served with a copy of the petition.

The Court has directed this office to request that you file a response to the petition. Forty printed copies of your response, together with proof of service thereof, should reach this office on or before July 1, 1964.

Very truly yours,

JOHN F. DAVIS, Clerk

By

Michael Rodak, Jr.
Deputy Clerk

MRjr:jmh

AIR MAIL

cc: ✓ Carl Rachlin, Esq.
38 Park Row
New York, N. Y.

STATE OF FLORIDA
OFFICE OF THE
ATTORNEY GENERAL
TALLAHASSEE

JAMES W. KYNES
ATTORNEY GENERAL

June 30, 1964

Honorable Ernest Jackson
410 Broad Street
Suite No. 208
Jacksonville, Florida

Florida

Re: Callender et al. v. State

Dear Mr. Jackson:

Enclosed herewith is a copy of the response to petition for writs of certiorari in the above-styled cause.

With kind regards, I remain

Sincerely,

James W. Kynes
Attorney General

By:
George R. Georgieff
Assistant Attorney General

GRG/im

Enclosure

cc: Messrs. Rachlin, McKissick, Oldham, Sweet & Finney
38 Park Row
New York, New York

July 23, 1964

Benson Scotch, Esq.
2425 Vauxhall Street
Union, New Jersey

Re: Herbert E. Callendar
James O'Connor and
Leslie Lee Smith
vs
State of Florida

Dear Benson:

Enclosed is a brief of the respondents in your case.

I would appreciate having your analysis.

Kindest regards,

Carl Rachlin, Esq.
General Counsel

CC: Herbert Callendar
755 East 168th Street
Bronx 56, New York

COPY

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON 25, D. C.

October 12, 1964

[illegible] 13 1964

The Honorable James W. Kynes
Attorney General of Florida
Judicial Building, Room 134
Tallahassee, Florida

file

RE: CALLENDER, ET AL. v. FLORIDA
No. 58, October Term, 1964

Dear Sir:

I have been directed by the Court to request that you file a response "on the merits" to this petition for writ of certiorari.

Forty printed copies of your response, together with proof of service thereof, should reach this office on or before November 10, 1964.

Very truly yours,

JOHN F. DAVIS, Clerk

By

E. P. Cullinan
Chief Deputy

EPC:jmh

cc: Carl Rachlin, Esq.
38 Park Row
New York, N. Y.

AIR MAIL

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

APR 27 1965

April 26, 1965

RE: CALLENDER, ET AL. v. FLORIDA,
No. 58, OCT. TERM, 1964

Dear Sir:

Enclosed is a copy of the opinion *per curiam* entered by the Court today in the above-entitled case.

Very truly yours,

JOHN F. DAVIS, Clerk
By E. T. Lyddane
Assistant

Enclosure

Carl Rachlin, Esq.
38 Park Row
New York, N.Y.

SUPREME COURT OF THE UNITED STATES

CALLENDER ET AL. *v.* FLORIDA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 58. Decided April 26, 1965.

PER CURIAM.

The petition for writ of certiorari is granted and the judgments are reversed. *Boynton* v. *Virginia*, 364 U. S. 454. *Abernathy* v. *Alabama*, 380 U. S. 447.

MAY 2 4 1965

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

May 21, 1965

Carl Rachlin, Esquire
38 Park Row
New York, New York

RE: Callender et al. v. Florida,
No. 58, October Term, 1964

Dear Mr. Rachlin:

The mandate of this Court in the above-entitled case has been mailed today to the Clerk of the Supreme Court of Florida.

Your clients are given recovery for costs in this Court as follows:

Clerk's costs $100

This amount may be collected through the Supreme Court of Florida or direct from opposing counsel or parties.

Yours truly,

JOHN F. DAVIS, Clerk

By Evelyn R Limstrong
(Mrs) Evelyn R. Limstrong
Assistant

June 7, 1965

Hon. Ernest Jackson
410 Broad Street
Suite No. 208
Jacksonville, Florida

Re: Callendar et al vs. Florida

Dear Ernest;

I enclose a photocopy of a letter which I think you might like to have which shows that in your case Callender vs. Florida you have been awarded Clerk's costs of $100. This was a great victory and your efforts in producing a fine court record are appreciated by everybody concerned.

With kindest regards, I look forward to seeing you very soon.

Sincerely,

CARL RACHLIN
General Counsel

CR/cs
Enc.

Ernest D. Jackson, Sr.
ATTORNEY AND COUNSELLOR-AT-LAW
MASONIC TEMPLE BLDG. 410 BROAD ST.
PHONE EL 4-0467-68
JACKSONVILLE, FLORIDA

February 2, 1966

Carl Rachlin, Esquire
208 Broadway
New York 7, New York

Re: Callendar, O'Connor & Smith v.
Florida File No. 3650

Dear Sir:

Enclosed is a copy of the Supreme Court's Opinion withdrawing its original mandate to the District Court of Appeal of Florida, directing the judgment and sentence against each of the defendants to be set aside. The Opinion itself is explanatory and I am writing you for information concerning the next steps you plan to take at the Supreme Court level.

Very truly yours,

Ernest D. Jackson, Sr.

Ernest D. Jackson, Sr.

copy to Jackson

(4)

① Mr also copy to

Professor Anthony Amsterdam Univ of Penn.

② Howard our Miami attorney in Dresher Case

③ Rich

Irving Panzer, esq.
1735 De Sales St N.W
Washington D C

Dear Irve

I need your urgent advice and enclose ~~H~~a copy of the opinion of the Supreme Court of Florida. Briefly in this case we went all through the Florida Courts as indicated in their opinion, getting reactions,

(over)

if not opinions, from Florida Court. At no time did the state or the Court say we had gone to too many Courts in Florida. In fact the Florida Supreme Court assumed we were properly before it, and the state did not object. In the U.S. Supreme Court no one raised these questions as I recall. After the U.S. Supreme Court mandate came down, the state thinks of this gimmick. I assume what they have in mind is the charming fact that we lost our right to ~~appeal~~ seek certiorari in the U.S. Supreme Court since ~~by~~ at the time we applied, since we should not have gone to the Florida Supreme Court, our time to file with the U.S. Supreme Court had expired, and accordingly the convictions should not have been reversed.

The mandates have been returned to the U.S. Supreme Court. I suppose we can take the position (a) the U.S. Supreme Court has acted and there is a kind of estoppel (b) in any event even if Florida is serious, and not trying to horse everyone around as I suspect, ~~(they~~ then the U.S. Supreme Court can take the position that in effect they extended our time to file for certiorari, and having done

Callender
v
Florida

February 8, 1966

Irving Panzer, Esq.
1735 De Sales Street, N. W.
Washington, D. C.

Dear Irve:

I need your urgent advice and enclose a copy of the opinion of the Supreme Court of Florida. Briefly in this case we went all through the Florida courts as indicated in their opinion, getting reactions, if not opinions, from Florida courts. At no time did the state or the court say we had gone to too many courts in Florida. In fact, the Florida Supreme Court assumed we were properly before it, and the state did not object. In the United States Supreme Court no one raised these questions, as I recall. After the Supreme Court mandate came down, the state thinks of this gimmick. I assume what they have in mind is the charming fact that we lost our right to seek certiorari in the United States Supreme Court since at the time we applied, since we should not have gone to the Florida Supreme Court, our time to file with the United States Supreme Court had expired, and accordingly the convictions should not have been reversed.

The mandates have been returned to the United States Supreme Court. I suppose we can take the position (a) the United States Supreme Court has acted and there is a kind of estoppel (b) in any event, even if Florida is serious, and not trying to horse everyone around as I suspect, then the United States Supreme Court can take the position that in effect, they extended our time to file for certiorari, and having done that reversed the convictions.

Cont'd...

When I received this opinion I assumed it was a smart alecky joke in view of our experience in the Dresner case. I thought some of my wise-guy friends in Florida thought they would have a laugh, but alas, the Florida court is seemingly serious, though probably thinking how they may have all their northern lawyers and judges in a cute bind. I find it difficult to believe the United States Supreme Court is going to reverse itself because no one, particularly the Florida Supreme Court, understands.

I have an additional thought that sounds a little wild but in truth, in light of the confusion in Florida (to give it its best light), I want to move for rehearing ro reargument in the Dresner case. No one should have his rights and the permanency of a criminal record depend on such will-o-the-wisp procedure. I wish to suggest to the United States Supreme Court to reconsider having sent back Dresner to Florida and telling us that certiorari was improvidently granted. It was not improvidently granted. You will recall at the argument not only did Howard appear unable to answer the questions of the United States Supreme Court, but also the representative of the State in whose favor the argument appeared to be was equally non responsive. The reason is how apparent, no one, including the Florida Supreme Court, knows the procedure.

I hesitate to suggest it but doesn't it seem as if the Florida Supreme Court made up the procedure on receiving the papers from the United States Supreme Court in Dresner, and then forgot its procedure in order to be patriotically in line in affirming the conviction in Callender?

In any event, I want a good opinion from some of you hot-shots in Washington, because I want to lick the bastards both ways.

Love to Sue.

Regards,

CARL RACHLIN
General Counsel

CR/cs
Enc.

LAW OFFICES
IRVING R. M. PANZER
1735 DE SALES STREET, N. W.
WASHINGTON, D. C. 20036

TELEPHONE
STERLING 3-3391

FEB 17 1966

February 16, 1966

Carl Rachlin, Esq.
Congress of Racial Equality
38 Park Row
New York, New York

Dear Carl:

I have looked into the Case of the Bouncing Mandate, otherwise known as Callendar v. Florida, et al. After I stopped chuckling at the grisly humor concocted by the Supreme Court of Florida, which (in the light of Dresner v. Tallahassee) is probably killing itself laughing, I studied the matter and came to the conclusion that you have no real problems here - it is simply a question of to whom the mandate of the Supreme Court should be addressed. I cannot see any possibility that your petition for certiorari can be considered out of time, since you had a procedural right to go to the Supreme Court of Florida, even though that court denied your writ on the ground (they say) of lack of jurisdiction. As I see it, if the mandate is presently directed to the wrong court, it should be re-typed to contain the name of the District Court of Appeal, if that is the proper court.

You will be glad to hear that I talked this matter over with Gene Gressman, the bible on such things, and he agrees with me, and even goes further. He thinks the mandate could be addressed directly to the trial court, skipping all intermediate courts. According to Gene, this is a phase of a fairly common problem in the Clerk's office - being sure the correct court is named. Lawyers are always naming the wrong court, in all types of cases coming up, and the Clerk's office spends a lot of time correcting this. To illustrate that it isn't considered much of a problem, Gene tells me that the Clerk will sometimes tell the perplexed lawyer to take his pen and make his correction by hand.

The Court itself is not much interested in this sort of thing, but the Clerk's office is. They consider it a goofing-up by them if there is an error in naming the court. They feel they should catch it. A question in my mind is whether the Court will simply amend or re-write the mandate itself, without hearing from you, or whether they will want a motion from you.

Now for the present status of the case. I took the liberty of talking to the Clerk's office on your behalf. John Davis is out of town, enjoying himself on a leisurely cruise, and will be back on February 24. I talked to his chief assistant, Edward Cullinan. He knew all about the mandates having been returned, of course, and talked to John Davis about it before

John left on vacation. They did not know what to do about it, it being most unusual in this century to have a state court return the mandate (and I think the Clerk's office is rather miffed at the idea), and took no action, so at the moment the mandates are just sitting there. When John returns, he will probably discuss the matter with the Chief Justice and they will determine what to do.

Cullinan says that this might be treated as simply a case of having the wrong court named. He says that the law in Florida is obviously confused or unclear, and most of the lawyers in Florida couldn't tell you what the Florida legal system is. He didn't say so, but I derived the feeling that he doesn't think you have much of a problem here. However, in view of the political and social overtones, it's clear that the Clerk's office will not itself do anything about the situation; they are going to get instructions from the Chief. And the Chief might, of course, want to have it discussed by the full Court.

There is nothing for you to do at this time. If they feel they want to have a motion from you, instead of simply doing it themselves in chambers, they will let you know. All you can do at this time is wait until you hear from the Court.

Sincerely,

Irving R. M. Panzer

IRMP:gld

SUPREME COURT OF THE UNITED STATES

CALLENDER ET AL. *v.* FLORIDA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 58, October Term, 1964. Decided February 28, 1966.

PER CURIAM.

The mandate of this Court in this case issued on the 21st day of May, 1965, is hereby recalled and the judgment heretofore entered on the 26th day of April, 1965, is hereby vacated. The order of the Court dated the 26th day of April, 1965, granting the writ of certiorari to the Supreme Court of Florida is vacated.

Treating the papers submitted as a petition for a writ of certiorari to the District Court of Appeal of Florida, First District, the petition for a writ of certiorari is granted and the judgments are reversed. *Boynton* v. *Virginia,* 364 U. S. 454; *Abernathy* v. *Alabama,* 380 U. S. 447.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

po Fla. vial

Callender
v
Fla

March 1, 1966

Ernest Jackson, Esq.
410 Broad Street
Jacksonville, Florida

Dear Ernest:

I enclose a copy of a response to my request for information from Irv Panzer. In addition, I have since learned that the matter will probably receive some instruction from the court as to what to do and I am not seriously concerned about the problem, however, the only thing I resent are the smirks that are on the faces of the Attorney General's office of the State of Florida and your Supreme Court, but maybe we can pull a smart one on them by reopening Bresner because of their little too fancy footwork.

With best regards,

Sincerely,

CARL RACHLIN
General Counsel

CR/cs

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

March 25, 1966

Carl Rachlin, Esquire
38 Park Row
New York, New York

MAR 2 8 1966

RE: Callender et al. v. Florida,
No. 58, Oct. Term, 1964

Dear Mr. Rachlin:

The mandate of this Court in the above-entitled case has been mailed today to the Clerk of the District Court of Appeal of Florida, First District.

You were advised in my letter of May 21, 1965, that your clients were given recovery for costs in this Court in the amount of $100, the Clerk's costs, to be collected through the Supreme Court or direct from opposing counsel or parties. If this has not been collected, you may do so through the District Court of Appeal of Florida, First District, or from counsel or parties.

Yours truly,

JOHN F. DAVIS, Clerk

By Evelyn R Limstrong

(Mrs) Evelyn R. Limstrong
Assistant

cc: Ernest Jackson, Esq.
Suite 208, 410 Broad Street
Jacksonville, Fla.

MEMO *from*

TO: MIKE OR CAROL

Advise me what costs are we entitled to in this case in addition to the $100 referred to by the clerk:
example; printing of briefs
and records, etc.

CR

CR

I Re: Callender et al. v. Florida — cost II
85 S.Ct. 1325 (1965)
#58 Oct. Term 1964

Criminal conviction (trespassing ?) reversed in memorandum decision citing Boynton v. Com. of Va., 364 U.S. 454, 81 S.Ct. 182, 5 L.ed 2d 206 (1960). Boynton avoids the constitutional issue and says interstate bus passengers had right to eat in white portion of terminal restaurant. (Interstate Commerce Act), so passenger was not there "without right of law", so was not trespassing under state statute.

II 1.) Costs in criminal cases are the same as in civil cases. Bozel v. U.S. 139 F 2d 153 (cert denied)

2.) A state may not claim sovereign immunity in the Supreme Court ~~[illegible] on appeal of a criminal conviction~~ when the Supreme Court taxes costs against the state upon reversing ~~the~~ a criminal conviction ~~for~~ on constitutional grounds. Fairmont Creamery v. Minn. 275 U.S. 70, 72 L.ed 168, 48 S.Ct. 97 (1927). The rule should apply equally in any ~~[illegible]~~ criminal appeal or other ~~[illegible]~~ case where there is no issue of whether the sovereign consented to be sued.

III. Taxable Costs

~~[illegible]~~ The law of costs is entirely statutory. The judges have considerable discretion, however, as to which items they will grant, from the menu provided for by statute. The relevant statutes are 28 U.S.C. §§ 1911, 1920, 1923 and Supreme Court Rule 32.

28 U.S.C. – Chapter 123 Fees and Costs

§ 1911 — Sup. Ct. Rule 32

(3) – in case of reversal – costs to appellant shall include cost of the transcript of the record from the court below and shall be taxable in that court as costs in the case.

amended

(7) Docketing fees

$25.00 – docketing a case and filing and entering transcript

.25 – entering an appearance

~~.25 – filing a motion~~

1.00 – entering a judgment

$10.00 – filing a brief – per party

$5.00 – order on petition for writ of certiorari

Rule 32 (7) The fees to be charged by the Clerk are fixed as follows: for docketing a case on appeal or petition for writ of certiorari or docketing any other proceeding – $100, to be increased to $150 in a case on appeal when oral argument is permitted.

CLASS OF SERVICE

This is a fast message unless its deferred character is indicated by the proper symbol.

WESTERN

TELEGRAM

The filing time shown in the date line on domestic telegrams is LOCAL TIME

A017 NBB185 RB104

103 WW NFA036 COLLECT NF WASHINGTON DC 26 1250P EDT

CARL RACHLIN
38 PARK ROW NYK

JUDGMENTS CALLENDER AGAINST FLORIDA REVERSED TODAY OPINION MAILED

JOHN F DAVIS CLERK

§1920 Taxation of costs. Any judge MAY...

1) Fees of the clerk and marshall
2) Court reports
3) fees & disbursements for printing and witnesses
4) fees for exemplification and copies
5) docket fees under §1923

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree

§1923 Docket Fees and Costs of Briefs

Atty.s and proctors' docket fees in courts of U.S. may be taxed as costs as follows:

$20.00 trial or final hearing - civil, criminal or admiralty
$2.50 for each deposition admitted in evidence

IV CASES

- briefs: "It has never been the practice of the Supreme Court in cases brought before it under its appellate jurisdiction to tax as costs disbursements by counsel or tax for printing briefs." Ex parte Hughes (1885) 5 S. Ct. 1008, 114 U.S. 548, 29 L ed 281.

— "Fees paid to the clerk of the former circ. ct. for a former citation, writ of error, and for certifying the transcript were nonetheless "costs of the appeal," and taxable as such, because taxable in the former cir. ct. after determination of the appeal. Berthold v. Burton (C.C.N.Y. 1909), 169 F. 495.

V SUMMARY.

I don't know what steps have already been taken, but a bill of costs should be quickly prepared if it has not already been filed. It must be filed in the same term (1965 or 1964?). The items are

$100 - Rule 32(7), already taxed, the fee paid by appellant to the court for docketing of the appeal.

$20 - ~~Rule~~ §1923 - Atty.s fees, trial or final hearing. But was there oral argument in this case? I assume not, since the docketing fee for the clerk was $100 and not $150. If not this fee may not be applicable.

Also recoverable, perhaps but I'm not sure, are any other docketing fees paid to the court under Rule 32(7). Also recoverable are any ~~fees~~ expenses appellant had in having transcript in case below printed for appeal, and in obtaining necessary copies.

~~Also, it may be possible to recover costs in the Florida courts. This must be researched.~~

③

Costs: Florida

I assume that costs have been taxed against the defendants in Florida.

45 Florida Statutes Ann. §939.02

"In all cases of conviction for crime the costs of prosecution shall be included and entered up in the judgment rendered against the convicted person."

However they should be entitled to refund of any costs paid to the county or state.

45 F.S.A. §939.06

"No defendant in a criminal prosecution who is acquited or discharged shall be liable for any costs or fees of the court or any ministerial office, or for any charge of subsistence while detained in custody. If he shall have paid any taxable costs in the case, the clerk or justice shall give him a certificate of the payment of such costs, with the items thereof, which, when audited and approved according to law, shall be refunded to him by the county."

— It is not clear that the statute covers costs assessed in the Florida Supreme Court, but the first sentence of the statute clearly shows at least a legislative policy against taxing acquited defendants in any court.

Defendants' expenses
Attorney fees, costs of printing briefs, etc., do not appear to be recoverable.

In the

All Caps → Supreme Court of the United States

No. —

Names: All Caps

Herbert Callender, James O'Connor, Leslie Lee Smith,

Upper & Lower Italics → Petitioners

v.

All Caps → State of Florida

All Caps

Application for Extension of Time in Which to File Petition for Writ of Certiorari

To the Honorable Hugo L. Black, Justice of the United States Supreme Court and Circuit Justice for the Fifth Circuit:

(2)

(1 + 4)

① The petitioners hereby respectfully apply for an extension of time within which to file a petition for a writ of certiorari to review the judgment of the Supreme Court of Florida in the above-entitled proceeding. That judgment was entered on December 3, 1963, and the time in which to file such a petition will expire on March 2, 1964. This application requests that the time be extended from March 2, 1964 to and including April 13, 1964.

The petitioners were convicted in the County Judge's Court in and for Marion County, Florida, of unlawful assembly.x The cause was appealed to the District Court of Appeal, First District of Florida, and there dismissed.x The Supreme Court of Florida dismissed the subsequent appeal, and on December 3, 1963 denied a petition for rehearing.x

The federal questions were raised in the several trials by

4

motions for directed verdicts of acquittal (Smith, 183; Callender, 202; O'Connor, 137), motions for a new trial, and subsequently at each stage of the state appeals, including the petitions for rehearing before the Florida Supreme Court.

The petitioners were passengers on a Greyhound bus operating as an interstate carrier on June 16, 1961. When it stopped at the terminal in

5

Ocala, Florida, the petitioners attempted to use the facilities at the terminal. All three were told to return to the bus after a brief period of scuffling with local residents near the terminal entrance. They refused to do so and were arrested for unlawful assembly under § 870.02 of the Florida Statutes

The jurisdiction of this Court rests on 28 U.S.C. 1257(3), petitioners having asserted below deprivations of rights, privileges, and immunities secured by the Constitution of the United States.

The primary issues to be raised are whether the application of Florida Statutes, § 870.02, to the present facts constitutes a violation of the equal protection clause of the Fourteenth Amendment; whether the facts presented reveal a violation of petitioners' rights under Title 49, U.S.C. §316(d),

Section 316(d)"

prohibiting discrimination in terminal facilities of interstate bus companies; and whether the present facts reveal a violation of the commerce clause of the Constitution, in that treatment of the petitioners constituted an unlawful burden on commerce.

Additional time ~~[illegible]~~ is requested because ~~[illegible]~~ ~~or uncertain~~ ~~the preparation of such petition is~~ ~~has counsel for the petitioners~~ the nature of the case has ~~made~~ created a severe and unusual ~~and~~ ~~difficulties~~ handicap ~~to those preparing~~ for ~~those~~ counsel undertaking ~~the work of~~ preparation of the petition. Though the case was tried in Florida, ~~the~~ work on ~~appeal~~ ~~is~~ petition for certiorari is being assisted ~~prepared~~ by attorneys ~~lawyers~~ in New York, and New Jersey, ~~and the~~ ~~[illegible]~~ Carl Rachlin, Esq., of New York, Geoffrey

RACHLIN

A

Gaulkin, J.B. Esq., of New Jersey and Benson D. Scotch, Esq., of New Jersey, all without compensation. Only one copy each of the ~~very~~ extensive records were ~~was~~ able to be supplied to counsel, and even ~~this~~ these ~~copy~~ were was made available only after several weeks of petitioners' time had elapsed. On this basis the ~~foregoing~~ attorneys ~~preparation~~ for petitioners have ~~suffered~~ not been able to make the progress hoped for, even accounting for the fact that the attorneys have been able to attend to the case only during their free hours. Finally, both Messrs. Zoulkin and Scotch, who are ~~[illegible]~~ drafting the petition for certiorari, both became fathers ~~[illegible]~~ in the period subsequent to receiving the ~~papers~~ ~~[illegible]~~ records of the proceedings below, and have been further hampered in their efforts to meet and complete their work.

It is noted here that the lack of any opinion ~~during~~ at any stage of the case below has ~~[illegible]~~ ~~made the petitioners~~ ~~[illegible]~~ introduced ambiguities

as to ~~the~~ ~~[illegible]~~ what constitutes the state holding below and has added further to the scope of petitioners' work.) ~~And~~ ~~In view~~ ~~of~~
(This also accounts for the lack of an opinion attached hereto.)

~~Because of the~~

~~the lack of an opinion below~~

~~In view of the foregoing,~~

~~no opinion has been attached hereto.~~

Wherefore, it is respectfully requested that the time for filing the petition be extended to and including April 13, 1964.

Respectfully submitted,

Carl Rachlin General
~~Counsel~~ counsel, Congress
of Racial Equality
165 W. 46th St.
New York, N.Y.

Benson D. Scotch
2425 Vaux Hall Rd.,
Union, N.J.

Geoffrey Gaulkin
14 El Dorado Pl.
Weehawken, N.J.

IN THE
DISTRICT COURT OF APPEAL
OF FLORIDA
FIRST DISTRICT

LESLIE LEE SMITH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

TRANSCRIPT OF RECORD

VOLUME I

PETITION FOR WRIT OF CERTIORARI

TO THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND. FOR MARION COUNTY, FLORIDA.

ERNEST D. JACKSON, SR.
410 Broad Street, Suite 208
Jacksonville, Florida

For Petitioner

HON. RICHARD W. ERVIN, ESQ.
Attorney General
State of Florida
Tallahassee, Florida

For Respondent

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IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF FLORIDA, IN
AND FOR MARION COUNTY, FLORIDA

LESLIE LEE SMITH Appellant,	)	
vs.	)	Appeal from the County Judge's Court, in and for Marion County.
STATE OF FLORIDA, Appellee.	)	

ORDER DENYING PETITION FOR REHEARING

This cause coming on upon a petition for rehearing filed by the above appellant through his attorney and the Court having considered said petition for rehearing, it is,

ORDERED, ADJUDGED AND DECREED that appellant's petition for rehearing be and the same is hereby denied.

Done and Ordered at Ocala, Marion County, Florida, this 17 day of September, A. D., 1962.

/s/ D. R. Smith
CIRCUIT JUDGE

I HEREBY CERTIFY that on this 17 day of September, A. D., 1962, I mailed a copy of this order to each of the addresses listed below.

/s/ D. R. Smith
CIRCUIT JUDGE

HONORABLE GORDON G. OLDHAM, JR.
State Attorney
Kilgore Building
Leesburg, Florida

ERNEST D. JACKSON, SR., ESQ.
Attorney at Law
410 Broad Street, Suite #208
Jacksonville, Florida

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF FLORIDA, IN AND
FOR MARION COUNTY

LESLIE LEE SMITH, Appellant,

-VS-

STATE OF FLORIDA, Appellee.

Appeal from County Judge's Court, in and for Marion County.

PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MARION COUNTY:

Petitioner, Leslie Lee Smith, files this, his petition for rehearing, respectfully requesting this Honorable Court to reconsider its Order of Dismissal filed herein on August 24, 1962. As grounds for rehearing, he respectfully suggests the following:

1. The Court apparently overlooked Florida Appellate Rule 6.1 which provides as follows:

> "Appeals and criminal cases to the Supreme Court, the District Courts of Appeal and to the Circuit Courts (including appeals from Municipal Courts), shall be prosecuted in accordance with Part VI of these rules and, except as herein stated, with such provisions of other parts of these rules as are not inconsistent with the provisions of Part VI. As amended March 19, 1958, effective July 1, 1958."

2. The Court was apparently misled and erroneously applied Florida Appellate Rule 3.2 of Part III, which setforth the content of Notice of Appeal filed in Civil actions, instead of following Florida Appellate Rule 6.4 of Part VI, which does not require the book and page number of the book in which the judgment is recorded to be setforth in the Notice of Appeal filed in Criminal cases.

3. The Court apparently ignored or overlooked Florida Appellate Rule 3.9, sub-paragraph "C" of Part III, which has no

counterpart in Part VI of the rules which provides in part:

> Time For-- Every motion on behalf of an appellee to quash or dismiss an appeal, to strike the record or any portion thereof shall be filed, and a copy thereof served upon the opposite party, on or before the day the appellee is required to file his brief.

4. The Court apparently overlooked the fact that the State in this case did not file its Motion to Dismiss until after the time for filing their brief had expired for more than four (4) days, and overlooked the fact that the filing of the brief and the time it was filed by the Appellant was in agreement with the Prosecuting Attorney and that the Motion for extension of time was filed merely as a precautionary measure which led to the subsequent agreement between the petitioners and the State to avoid the necessity of a hearing.

WHEREFORE, petitioner prays that the Court grant a rehearing in this matter, which would allow Counsel for Appellants to examine the records before the Court and to present any law touching upon the matters involved herein. This action is necessary because of the Court's Order of Dismissal which indicated that the dismissal is also based upon a consideration of the case on its merits.

/s/ Ernest D. Jackson, Sr.
ERNEST D. JACKSON, SR.
Attorney for Petitioner
410 Broad Street, Suite #208
Jacksonville, Florida

I HEREBY CERTIFY that a copy hereof has been furnished to GORDON G. OLDHAM, JR., State Attorney, Room #1, Kilgore Building, Leesburg, Florida, by U.S. Mail, this 8th day of September, 1962.

/s/ Ernest D. Jackson, Sr.
Attorney

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF FLORIDA, IN AND
FOR MARION COUNTY.

LESLIE LEE SMITH, Appellant, -vs- STATE OF FLORIDA, Appellee.	Appeal from the County Judge's Court, in and for Marion County.

ORDER GRANTING MOTION TO DISMISS

This cause on the 6th day of August, 1962, came on to be heard upon Appellee's Motion to Dismiss Appeal for failure of the Appellant to perfect his appeal in accordance with the requirements of the Florida Appellate Rules. Appearing at the hearing for the Appellee, STATE OF FLORIDA, was the State Attorney of the Fifth Judicial Circuit of Florida, Gordon G. Oldham, Jr., and appearing for the Appellant, LESLIE LEE SMITH, was his attorney, Ernest D. Jackson, Sr. At said hearing the Appellant's attorney stated that he had petitioned the court for an additional period of time to file his brief, the time for filing Appellant's brief under Rule 6.11 (b) being within thirty days after the filing of the transcript of record. Under Rule 3.7 (d) additional time may be granted for filing of briefs, provided there is a petition and an appropirate court order extending the time. A Motion for Extension of Time to File Brief in the above styled case does not appear in the record. The record fails to reflect any order from any court granting additional time for Appellant to file his brief under Rule 3.7 (d), or as provided by Rule 6.61. The brief in the above entitled cause should have been filed on or before the 5th day of October, 1961, which is thirty days after the transcript of record was filed by the Appellant on the 5th day of

September, 1961. The records reflect that the Appellant's brief was filed on the 9th day of October, 1961, a period of four (4) days later than the maximum time under Rule 6.11 (b) of the Florida Appellate Rules.

Appellant's Notice of Appeal omits the book and page number of the public records in which the order, judgment or decree is appealed from. Florida Appellate Rule 3.2 (c) states that the Notice of Appeal shall state the book and page number of public records in which it is recorded. In applying Florida Appellate Rule 6.1 and Rule 6.4 with Florida Appellate Rule 3.2, it is the Court's belief that the Notice of Appeal in the above styled case should state the book and page number of the judgment which is appealed.

On two previous occasions the Appellee, through its attorney, has moved to dismiss this appeal for failure of Appellant to follow the Florida Appellate Rules. On the first occasion Appellant had served the County Prosecuting Attorney with all documents, rather than the State Attorney of the Fifth Judicial Circuit, State of Florida, who is counsel for the State in the Circuit Court. At said hearing, as reflected by the order in the above styled cause, it was the Court's opinion that the State Attorney should have been served rather than the County Prosecuting Attorney. However, in fairness to the Appellant, said Court denied said motion to dismiss and gave the Appellant additional time to serve the proper party, the State Attorney of the Fifth Judicial Circuit of the State of Florida. Appellant, rather than serve the State Attorney as directed in said order, served the Assistant State Attorney of the Fifth Judicial Circuit of the State of Florida, and once again, this Court denied the motion to dismiss by Appellee and gave the Appellant additional time to serve the proper party, the State Attorney of the Fifth Judicial Circuit of the State of Florida.

It is the opinion of the Court that Appellant has neglected and failed to comply with the appropriate appellate rules; that such non-compliance has been flagrant, evidencing either ignorance of the rules or an indifference to a conscientious effort to effect compliance. It is now, therefore

ORDERED, ADJUDGED AND DECREED that the above Appeal be and the same is hereby dismissed under Florida Appellate Rule 6.13 for Appellant's failure to prosecute his appeal as required by the rules of appellate procedure.

However, through an abundance of caution, in order that the rights of the Appellant may not be unduly prejudiced, the Court has examined the record and briefs tendered by the Appellant herein and finds his appeal to be without substantial merit. It is further

ORDERED, ADJUDGED AND DECREED that the Clerk of the Circuit Court of the Fifth Judicial Circuit of Florida, in and for Marion County, shall file with the Clerk of the trial court a certified copy of this Order of Dismissal.

DONE AND ORDERED at Ocala, Marion County, Florida, this 24th day of August, A. D. 1962.

/s/ D. R. Smith
CIRCUIT JUDGE

I HEREBY CERTIFY that on the 24th day of August, 1962, I mailed a copy of this Order to each of the below addressees:

/s/ D. R. Smith
CIRCUIT JUDGE

Addressees:

Hon. Gordon G. Oldham, Jr.
State Attorney, Fifth Judicial Circuit
Kilgore Building
Leesburg, Florida

Mr. Ernest D. Jackson, Sr.
Attorney at Law
410 Broad Street, Suite #208
Jacksonville 2, Florida

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT OF THE
STATE OF FLORIDA, IN AND FOR
MARION COUNTY.

LESLIE LEE SMITH	)
Appellant,	) Appeal from the County Judge's Court,
vs.	) in and for Marion County, Florida
STATE OF FLORIDA,	)
Appellee.	)

NOTICE OF HEARING ON APPELLEE'S MOTION TO DISMISS APPEAL

TO: ERNEST D. JACKSON, SR.
Attorney for Appellant
410 Broad Street, Suite #208
Jacksonville, Florida

YOU WILL PLEASE TAKE NOTICE that the undersigned will call up for hearing Appellee's Motion to Dismiss the Appeal for Failure to Prosecute, said Motion filed herein, before one of the Circuit Judges of the Fifth Judicial Circuit of Florida, at the Court House in Ocala, Marion County, Florida, on the 6th day of August, A.D. 1962, at the hour of 9:30 o'clock A.M. or as soon thereafter as counsel can be heard.

PLEASE GOVERN YOURSELF ACCORDINGLY.

/s/ Gordon G. Oldham, Jr.
GORDON G. OLDHAM, JR.
State Attorney, Fifth Judicial Circuit
Room #1, Kilgore Building
Leesburg, Florida

I DO HEREBY CERTIFY that copy of the foregoing has been furnished, by mail, to ERNEST D. JACKSON, SR., Attorney for Appellant, 410 Broad Street, Suite #208, Jacksonville, Florida, this the 28th day of June, A. D. 1962.

/s/ Gordon G. Oldham, Jr.
GORDON G. OLDHAM, JR.
State Attorney, Fifth Circuit

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA, IN AND FOR MARION COUNTY.

LESLIE LEE SMITH Appellant, vs. STATE OF FLORIDA, Appellee.	Appeal from the County Judge's Court, in and for Marion County

NOTICE OF HEARING ON APPELLEE'S MOTION TO DISMISS APPEAL

TO: ERNEST D. JACKSON, SR.
Attorney for Appellant
410 Broad Street, Suite #208
Jacksonville, Florida

YOU WILL PLEASE TAKE NOTICE that the undersigned will call up for hearing Appellee's Motion to Dismiss the Appeal for Failure to Prosecute, said Motion filed herein, before one of the Circuit Judges of the Fifth Judicial Circuit of Florida, at the Court House in Ocala, Marion County, Florida, on the 6th day of July, A.D. 1962, at the hour of 2:00 o'clock P.M. or as soon thereafter as counsel can be heard.

PLEASE GOVERN YOURSELF ACCORDINGLY.

/s/ Gordon G. Oldham, Jr.
GORDON G. OLDHAM, JR.
State Attorney, Fifth Judicial Circuit
Room #1, Kilgore Building
Leesburg, Florida

I DO HEREBY CERTIFY that copy of the foregoing has been furnished, by mail, to ERNEST D. JACKSON, SR., Attorney for Appellant, 410 Broad Street, Suite #208, Jacksonville, Florida, this the 25th day of June, A.D. 1962.

/s/ Gordon G. Oldham, Jr.
GORDON G. OLDHAM, JR.
State Attorney, Fifth Circuit

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT OF THE
STATE OF FLORIDA, IN AND FOR
MARION COUNTY

LESLIE SMITH, Appellant, vs. STATE OF FLORIDA Appellee.	Appeal from County Judge's Court, in and for Marion County

NOTICE OF HEARING ON APPELLEE'S MOTION TO DISMISS APPEAL

TO: ERNEST D. JACKSON, SR.
Attorney for Appellant
410 Broad Street, Suite #208
Jacksonville, Florida

YOU WILL PLEASE TAKE NOTICE that the undersigned will call up for hearing Appellee's Motion to Dismiss the Appeal for Failure to Prosecute, said Motion filed herein, before one of the Circuit Judges of the Fifth Judicial Circuit of Florida, at the Court House in Ocala, Marion County, Florida, on the 19th day of June, A.D. 1962, at the hour of 10:00 o'clock, or as soon thereafter as counsel can be heard.

PLEASE GOVERN YOURSELF ACCORDINGLY.

/s/ Gordon G. Oldham, Jr.
GORDON G. OLDHAM, JR.
State Attorney, Fifth Judicial Circuit
Room 1, Kilgore Bldg, Leesburg, Fla.

I DO HEREBY CERTIFY that a copy of the foregoing has been furnished to ERNEST D. JACKSON, SR., Attorney for appellant, 410 Broad Street, Suite #208, Jacksonville, Florida, by mail, this the 7th day of May, 1962.

/s/ Gordon G. Oldham, Jr.

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL
CIRCUIT OF THE STATE OF FLORIDA, IN AND
FOR MARION COUNTY.

LESLIE SMITH,

Appellant,

-VS-

STATE OF FLORIDA,

Appellee.

Appeal from the County Judge's Court, in and for Marion County.

MOTION

Comes now the Appellant, by and through his undersigned attorney and respectfully moves the Court to stay any hearing on Appellee's Motion to Dismiss and require the Appellee to state what provisions of the Appellate Rules he contends has not been complied with. The Appellant further points out to the Court that under its Order dated February 23, 1962, the Appellee was required to comply with the Appellate Rules as they relate to the Appellee upon receipt of copies of Appeal records properly served upon him, the Appellee. That said records with briefs were properly served upon the Appellee by mail on March 27, 1962. That under the Criminal Appellate Rules the Appellee had twenty (20) days from the receipt of Appellant's brief to file the Appellee's brief, Rule 6.11. That more than thirty (30) days has past since the record and appellant's brief has been served upon the Appellee.

That under Appellate Rule 3.9, sub-paragraph "c", the Appellee is prohibited from filing a Motion after the time required for the Appellee to file his brief.

WHEREFORE, the Appellant respectfully moves the Court to:

1. Dismiss Appellee's Motion to Dismiss the Appeal on the grounds that the same was filed untimely.

2. That the Court stay any hearing on the Appellee's Motion and require the Appellee to designate the specific provision of the Appellate Rules which were not complied with.

3. That this Court set a hearing on Appellant's Appeal as soon as the same can be conveniently heard by the Court.

RESPECTFULLY SUBMITTED,

/s/ Ernest D. Jackson, Sr.
ERNEST D. JACKSON, SR.
Attorney for Appellant
410 Broad Street, Suite #208
Jacksonville, Florida

I HEREBY CERTIFY that a copy of the foregoing Motion has been furnished to GORDON G. OLDHAM, Jr., State Attorney, Room #1, Kilgore Building, Leesburg, Florida, by U.S. Mail, this 3rd day of May, 1962.

/s/ Ernest D. Jackson, Sr.
Attorney

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR MARION COUNTY.

LESLIE SMITH, Appellant, -VS- STATE OF FLORIDA, Appellee.	Appeal from the County Judge's Court, in and for Marion County.

MOTION FOR CONTINUANCE

Comes now the Appellant, by and through his undersigned attorney and moves the Court for the entry of an Order in the above styled cause, continuing the hearing on Appellee's Motion to Dismiss the Appeal set on June 4, 1962, to another date in June, because the appellant's undersigned attorney will be engaged in a Criminal trial for defendants who have been in jail for a period of two months or more. Said trial will probably last for two (2) or three (3) days.

/s/ Ernest D. Jackson, Sr.
ERNEST D. JACKSON, SR.
Attorney for Appellant
410 Broad Street, Suite #208
Jacksonville, Florida

I HEREBY CERTIFY that a copy of the foregoing Motion for Continuance has been furnished to GORDON G. OLDHAM, Jr., State Attorney, Room #1, Kilgore Building, Leesburg, Florida, by U.S. Mail, this 3rd day of May, 1962.

/s/ Ernest D. Jackson, Sr.
Attorney

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA, IN AND FOR MARION COUNTY.

LESLIE LEE SMITH,)
)
Appellant,)Appeal from the County Judge's
) Court, in and for Marion County
vs.)
)
STATE OF FLORIDA,)
)
Appellee.)
)

NOTICE OF HEARING ON APPELLEE'S MOTION TO DISMISS APPEAL

TO: ERNEST D. JACKSON, SR.
Attorney for Appellant
410 Broad Street, Suite #208
Jacksonville, Florida

YOU WILL PLEASE TAKE NOTICE that the undersigned will call up for hearing Appellee's Motion to Dismiss the Appeal for Failure to Prosecute, said Motion filed herein, before one of the Circuit Judges of the Fifth Judicial Circuit of Florida, at the Court House in Ocala, Marion County, Florida, on the 4th day of June, A.D. 1962, at the hour of 10:00 o'clock A.M. or as soon thereafter as counsel can be heard.

PLEASE GOVERN YOURSELF ACCORDINGLY.

/s/ Gordon G. Oldham, Jr.
GORDON G. OLDHAM, JR.
State Attorney, Fifth Judicial Circuit
Room #1, Kilgore Building
Leesburg, Florida

I DO HEREBY CERTIFY that copy of the foregoing has been furnished, by mail, to ERNEST D. JACKSON, SR., Attorney for Appellant, 410 Broad Street, Suite #208, Jacksonville, Florida, this the 1st day of May, A. D. 1962.

/s/ Gordon G. Oldham, Jr.
State Attorney

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR MARION COUNTY.

LESLIE LEE SMITH,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

Appeal from the County Judge's Court, in and for Marion County.

MOTION TO DISMISS APPEAL FOR FAILURE TO PROSECUTE

COMES NOW Gordon G. Oldham, Jr., State Attorney in and for the Fifth Judicial Circuit of the State of Florida, and moves to dismiss the appeal heretofore entered in the above styled cause by said defendant for the following reasons:

1. Said appeal has not been perfected according to the appropriate Florida Appellate Rules;
2. Said Appellant has not prosecuted this appeal as required by the Florida Appellate Rules.

DATED this the 30th day of April A. D. 1962.

/s/ Gordon G. Oldham, Jr.
GORDON G. OLDHAM, JR.
State Attorney, Fifth Judicial
Circuit of the State of Florida

I DO HEREBY CERTIFY that a copy of the foregoing has been furnished to ERNEST D. JACKSON, SR., Attorney for Appellant, 410 Broad Street, Suite #208, Jacksonville, Florida, by mail, this the 1st day of May, A. D. 1962.

/s/ Gordon G. Oldham, Jr.
State Attorney

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF FLORIDA, IN AND
FOR MARION COUNTY.

Appeal from the County Judge's Court
In and For Marion County.

LESLIE LEE SMITH,

Appellant,

-VS-

STATE OF FLORIDA,

Appellee.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Record has been furnished to Gordon G. Oldham, Jr., State Attorney, Room #1, Kilgore Building, Leesburg, Florida, by U.S. Mail, this 29th day of March, 1962.

/s/ Ernest D. Jackson, Sr.
ERNEST D. JACKSON, SR.
Attorney for Appellant
410 Broad Street, Suite #208
Jacksonville 2, Florida

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF FLORIDA, IN AND
FOR MARION COUNTY.

Appeal from the County Judge's Court
In and For Marion County.

LESLIE LEE SMITH,

Appellant,

-VS-

STATE OF FLORIDA,

Appellee.

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IN THE COUNTY COURT IN AND
FOR MARION COUNTY, FLORIDA.

STATE OF FLORIDA

VS

LESLIE LEE SMITH

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Transcript of Testimony of Trial and the Final closing argument has been furnished to Gordon G. Oldham, Jr., State Attorney, Room #1, Kilgore Building, Leesburg, Florida, by U.S. Mail, this 27thday of March, 1962.

/s/ Ernest D. Jackson, Sr.
ERNEST D. JACKSON, SR.
Attorney for Defendant
410 Broad Street, Suite #208
Jacksonville 2, Florida

IN THE COUNTY JUDGE'S COURT
IN AND FOR MARION COUNTY, FLORIDA.

THE STATE OF FLORIDA

VS

LESLIE SMITH

Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Motion For New Trial has been furnished to Gordon G. Oldham, Jr., State Attorney, Room #1, Kilgore Building, Leesburg, Florida, by U. S. Mail, this 27th day of March, 1962.

/s/ Ernest D. Jackson, Sr.
ERNEST D. JACKSON, SR.
Attorney for Defendant
410 Broad Street, Suite #208
Jacksonville 2, Florida

IN COUNTY JUDGE'S COURT
MARION COUNTY, FLOEIDA

STATE OF FLORIDA

VS

LESLIE LEE SMITH,

Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Plea, Verdict, Judgment and Sentence has been furnished to Gordon G. Oldham, Jr. State Attorney, Room #1, Kilgore Building, Leesburg, Florida, by U.S. Mail, this 27th day of March, 1962.

/s/ Ernest D. Jackson, Sr.
ERNEST D. JACKSON, SR.
Attorney for Defendant
410 Broad Street, Suite #208
Jacksonville 2, Florida

IN THE COUNTY JUDGE'S COURT
IN AND FOR MARION COUNTY, FLORIDA

THE STATE OF FLORIDA

-VS-

LESLIE SMITH,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Notice of Appeal has been furnished to Gordon G. Oldham, Jr., State Attorney, Room #1, Kilgore Building, Leesburg, Florida, by U.S. Mail, this 27th day of March, 1962.

/s/ Ernest D. Jackson, Sr.
ERNEST D. JACKSON, SR.
Attorney for Defendant
410 Broad Street, Suite #208
Jacksonville, Florida

IN THE COUNTY JUDGE'S COURT
IN AND FOR MARION COUNTY, FLORIDA

STATE OF FLORIDA

VS

LESLIE SMITH

Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Assignment of Errors has been furnished to Gordon G. Oldham, Jr., State Attorney, Room #1, Kilgore Building, Leesburg, Florida, by U. S. Mail, this 27th day of March, 1962.

/s/ Ernest D. Jackson, Sr.

ERNEST D. JACKSON, SR.
Attorney for Defendant
410 Broad Street, Suite #208
Jacksonville 2, Florida

IN THE COUNTY JUDGE'S COURT
IN AND FOR MARION COUNTY, FLORIDA

STATE OF FLORIDA

VS

LESLIE SMITH,

Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Defendant's Requested Instructions has been furnished to Gordon G. Oldham, Jr., State Attorney, Room #1, Kilgore Building, Leesburg, Florida, by U.S. Mail, this 27th day of March, 1962.

/s/ Ernest D. Jackson, Sr.
ERNEST D. JACKSON, SR.
Attorney for Defendant
410 Broad Street, Suite #208
Jacksonville 2, Florida

IN THE COUNTY JUDGE'S COURT
IN AND FOR MARION COUNTY, FLORIDA.

THE STATE OF FLORIDA

VS

LESLIE LEE SMITH

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Directions To The Clerk has been furnished to Gordon G. Oldham, Jr., State Attorney, Room #1, Kilgore Building, Leesburg, Florida, by U.S. Mail, this 27th day of March, 1962.

/s/ Ernest D. Jackson, Sr.
ERNEST D. JACKSON, SR.
Attorney for Defendant
410 Broad Street, Suite #208
Jacksonville 2, Florida

IN THE COUNTY JUDGE'S COURT
IN AND FOR MARION COUNTY, FLORIDA

THE STATE OF FLORIDA,

Plaintiff,

-VS-

LESLIE SMITH,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Motion To Quash Information has been furnished to Gordon G. Oldham, Jr., State Attorney, Room #1, Kilgore Building, Leesburg, Florida, by U.S. Mail, this 27th day of March, 1962.

/s/ Ernest D. Jackson, Sr.
ERNEST D. JACKSON, SR.
Attorney for Defendant
410 Broad Street, Suite #208
Jacksonville 2, Florida

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT STATE OF FLORIDA

STATE OF FLORIDA

-VS-

LESLIE SMITH,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Motion For Extension Of Time To File Brief has been furnished to Gordon G. Oldham, Jr., State Attorney, Room #1, Kilgore Building, Leesburg, Florida, by U.S. Mail, this 27th day of March, 1962.

/s/ Ernest D. Jackson, Sr.
ERNEST D. JACKSON, SR.
Attorney for Defendant
410 Broad Street, Suite #208
Jacksonville 2, Florida

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL
CIRCUIT, IN AND FOR MARION COUNTY, FLORIDA

LESLIE SMITH,

Appellant,

-VS-

STATE OF FLORIDA,

Appellee.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Request For Oral Argument has been furnished to Gordon G. Oldham, Jr., State Attorney, Room #1, Kilgore Building, Leesburg, Florida, by U.S. Mail, this 27th day of March, 1962.

/s/ Ernest D. Jackson, Sr.
ERNEST D. JACKSON, SR.
Attorney for Appellant
410 Broad Street, Suite #208
Jacksonville 2, Florida

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL
CIRCUIT, IN AND FOR MARION COUNTY, FLORIDA

LESLIE SMITH,

Appellant,

-VS-

STATE OF FLORIDA,

Appellee.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Brief and Appendix to Brief has been furnished to Gordon G. Oldham, Jr., State Attorney, Room #1, Kilgore Building, Leesburg, Florida, by U.S. Mail, this 27th day of March, 1962.

/s/ Ernest D. Jackson, Sr.
ERNEST D. JACKSON, SR.
Attorney for Appellant
410 Broad Street, Suite #208
Jacksonville 2, Florida

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF FLORIDA, IN AND
FOR MARION COUNTY.

Appeal from the County Judge's Court,
In and For Marion County.

LESLIE LEE SMITH,)
Appellant,)
-VS-)
STATE OF FLORIDA,)
Appellee.)

ORDER GRANTING EXTENSION OF TIME TO FILE APPELLANT PAPERS WITH STATE ATTORNEY

This cause, on the 23rd day of March, 1962, came on to be heard pursuant to Appellant's notice for a hearing on the affidavits filed by the Appellee and the Appellant and pursuant to a Motion filed by the Appellant for an extension of time to file appellant papers with the State Attorney's office as ordered by this Court on February 23, 1962 denying the appellee's Motion to Dismiss. The Court having examined the records and papers turned over to the State Attorney, by the local prosecuting attorney, and finding them incomplete and the Court further being of the opinion that the appellant had made reasonable effort to comply with this Court's Order entered on February 23, 1962, and the Court further being of the opinion that this matter should be heard on its merits so as to accord the appellant every measure of justice, it is thereupon

ORDERED AND ADJUDGED as follows:

1. That appellant's Motion for extension of time to properly perfect and service all appellant papers in this matter upon Gordon G. Oldham, Jr., State Attorney, Fifth Judicial Circuit of Florida, and file the proper certificate of service in this Court

be, and the same is hereby, granted.

2. That the appellant be, and is hereby, directed to properly serve all appellant papers, filed in this matter, upon Gordon G. Oldham, Jr., State Attorney, Fifth Judicial Circuit of Florida and flie proper certificate setting forth the date of service upon said attorney within Fifteen (15) days from March 23, 1962, and the failure for said appellant to fully comply with this Order then in that event this matter shall stand dismissed as of April 7, 1962.

DONE AND ORDERED in Chambers at Ocala, Marion County, Florida, this 26th day of March, 1962.

/s/ D. R. Smith
CIRCUIT JUDGE

I HEREBY CERTIFY that on the 26th day of March, 1962, I mailed a copy of this order to each of the addresses listed below:

/s/ D. R. Smith
CIRCUIT JUDGE

Addressees:
Gordon G. Oldham, Jr.
State Attorney, Fifth Judicial Circuit
Kilgore Building
Leesburg, Florida

Ernest D. Jackson, Sr.
Attorney at Law
410 Broad Street, Suite 208
Jacksonville 2, Florida

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF FLORIDA, IN AND
FOR MARION COUNTY.

LESLIE SMITH, Appellant, -vs- STATE OF FLORIDA, Appellee.	Appeal from County Judge's Court, In and for Marion County.

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF MARION

Before me personally appeared, E. G. MUSLEH, County Prosecuting Attorney, who, after being duly sworn, deposes and says:

1. That Ernest D. Jackson, Sr., Attorney for the above Appellant, did call and ask me to send him the transcripts of testimony and other records so that he could submit same to Gordon G. Oldham, Jr., State Attorney, before March 6, 1962; at the time I agreed to do so but as an afterthought I advised him that I would have my secretary take all those papers served on me to Ben Daniel, Jr., Assistant State Attorney's office. Several days thereafter I received another call from the said Ernest D. Jackson, Sr., informing me that I had neglected to take the aforesaid documents to the State Attorney's office and pursuant to said call on the 8th day of March, 1962, I had my secretary, Miss Barbara Goolsby, deliver all the records which were served on me to Ben Daniel, Jr., Assistant State Attorney.

2. That the allegations contained in the cross-affidavit of Ernest D. Jackson, Sr., are true to the best of my knowledge.

/s/ E. G. Musleh

Sworn to and subscribed before
me this 23rd day of March, 1962.

/s/ V. M. Grinka (Seal)
Notary Public
My Commission Expires: April 19, 1965

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA, IN AND FOR MARION COUNTY.

Appeal from County Judge's
Court, In and For Marion County.

LESLIE LEE SMITH,)
Appellant,)
-VS-)
STATE OF FLORIDA,)
Appellee.)

MOTION

Comes now the Appellant, LESLIE LEE SMITH, by and through his undersigned attorney and respectfully moves the Court to reinstate his Appeal, if it is found that the required Appellant papers in said case were not filed with the State Attorney within the time provided by this Court's Order, upon the following grounds:

1. That copies of all preceedings were at all times in the hands of a State official, to-wit: Attorney E. G. Musleh, who held the only copy of the Transcript of Record and from whom these copies would have to be obtained since duplication was impossible within the time prescribed by the Court Order to service said papers upon the State Attorney.

2. That the Appellant made diligent effort to secure necessary appellant papers from Attorney E. G. Musleh and to have the same turned over to the State Attorney within the time prescribed by the Court Order, said effort being more particulary described as setforth in the affidavit filed herein by the Appellant. That the appellant were of the opinion that said appellant papers were infact delivered to the State Attorney or his assistance

within the time prescribed by the Court Order and had no reason to think otherwise.

WHEREFORE, the Appellant respectfully address this Motion to the Court's sound discretion and request either that the time for filing said papers with the State Attorney be extended to March 24, 1962 or if it is the ruling of this Court that this matter stand dismissed as a result of appellant's failure to comply with the Court Order for service of said papers within the time prescribed in the Court Order and therefore is dismissed, in that event the Appellant moves the Court to reinstate this Appeal upon the grounds that the Appellant made diligent effort to comply with the Court Order and should not be held at fault for his failure to strictly comply with the Court Order within the time limit as setforth in said Order.

RESPECTFULLY SUBMITTED,

/s/ Ernest D. Jackson, Sr.
Ernest D. Jackson, Sr.
Attorney for Appellant
410 Broad Street, Suite #208
Jacksonville 2, Florida

I DO HEREBY CERTIFY that a copy of the foregoing Motion has been furnished, by hand, to GORDON G. OLDHAM, JR. State Attorney, Room #1. this 23rd day of March A.D. 1962.

/s/ Ernest D. Jackson, Sr.
Attorney for Appellant

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA, IN AND FOR MARION COUNTY.

Appeal from County Judge's
Court, In and For Marion County.

LESLIE SMITH,
Appellant,
-VS-
STATE OF FLORIDA,
Appellee.

NOTICE OF HEARING

TO: GORDON G. OLDHAM, JR.
State Attorney, Fifth Judicial Circuit
Room #1, Kilgore Building
Leesburg, Florida

YOU WILL PLEASE TAKE NOTICE that the undersigned will call up for hearing Appellee's Affidavit, before the Honorable D. R. Smith, Circuit Judge in and for the Fifth Judicial Circuit of the State of Florida, at the Court House in Ocala, Marion County, Florida, at the hour of 11:30 A.M. on the 23rd day of March, A.D. 1962, or as soon thereafter as counsel can be heard.

GOVERN YOURSELF ACCORDINGLY.

/s/ Ernest D. Jackson, Sr.
ERNEST D. JACKSON, SR.
Attorney for Appellant
410 Broad Street, Suite #208
Jacksonville 2, Florida

I DO HEREBY CERTIFY that a copy of the foregoing Notice of Hearing has been furnished, by mail, to GORDON G. OLDHAM, JR., State Attorney, Room #1, Kilgore Building, Leesburg, Florida and to E. G. Musleh, County Prosecutor, P. O. Box 109, Ocala, Florida, this 14th day of March, A.D. 1962.

/s/ Ernest D. Jackson, Sr.
Attorney for Appellant

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR MARION COUNTY.

Appeal from County Judge's Court, In and For Marion County

LESLIE SMITH,)
Appellant,)
- VS -)
STATE OF FLORIDA,)
Appellee.)

CROSS-AFFIDAVIT

STATE OF FLORIDA)
) SS
COUNTY OF DUVAL)

BEFORE ME, personally appeared ERNEST D. JACKSON, SR., Attorney for Appellant Leslie Smith in the above entitled cause, who, after being first duly sworn by me according to law, upon his oath deposes and says: that after receiving a copy of Order Denying Motion to Dismiss on February 24, 1962 which stated that the appellant shall have ten days from the date of service of this Order upon which to supply Gordon G. Oldham, Jr., State Attorney, with copies of all appellate proceedings, I called Attorney E. G. Musleh at (the Marion County Courthouse) Ocala, Florida, to whom copies of all proceedings in the above case had been sent and who had the only copy of the Transcript of Testimony available, and asked him to send the Transcript of Testimony he had to me so I could submit same to Attorney Gordon G. Oldham, Jr. before March 6, 1962. Mr. Musleh agreed to send the papers to me at first, he then informed me that he would see the State Attorney or one of his assistance during the week and would turn over his complete files to him and get a receipt if it were agreeable to me; I agreed, and thanked him. On Monday, March 5th, a call was placed to Attorney Musleh to see if the copies had been delivered to the State Attorney's office and was told by the secretary that Attorney Musleh was in Court and would not return to his office until 1 P.M. of after. The secretary was asked to have Attorney Musleh return my call collect. A call was then placed to Attorney Oldham's office to see if he had received the papers and was told by one of his secretaries that Attorney Oldham was out. The secretary was asked to have Attorney Oldham call my office collect. After receiving no word from Attorney Musleh Monday, several other calls were placed Tuesday and the succeeding days to both Attorney Musleh and Attorney Oldham offices respectively without being able to contact either of them. I was informed that Attorney Musleh was in Court each time I called and after several days of this I was given his home phone number. On Thursday, the 8th of March, 1962, I even placed a call to Attorney Musleh at the office of Circuit Judge Smith whose chambers is located near the Court Room where Attorney Musleh was trying a case, without any success. On the afternoon of the 8th, Attorney Musleh was finally contacted at his residence and he assured us that the files had been turned over to the assistant State Attorney and he would send us a receipt or acknowledgment of same. There was nothing to indicate that this had not been done until copies of the affidavit, filed by Attorney Oldham, was received.

/s/ Ernest D. Jackson, Sr.
Affiant

Sworn to and subscribed before me
this 14th day of March, 1962.

/s/ Earlene Wade (Seal)
Notary Public, State of Florida at Large

My Commission expires: August 17, 1965.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy of the foregoing Cross-Affidavit has been furnished, by mail, to GORDON G. OLDHAM, JR., State Attorney, Room #1, Kilgore Building, Leesburg, Florida and to E. G. MUSLEH, County Prosecutor, P. O. Box 109, Ocala, Florida, this 14th day of March A.D. 1962.

/s/ Ernest D. Jackson, Sr.
Attorney for Appellant

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA, IN AND FOR MARION COUNTY

LESLIE LEE SMITH, Appellant, vs. STATE OF FLORIDA, Appellee.	Appeal from County Judge's Court, in and for Marion County

RE - CROSS AFFIDAVIT

STATE OF FLORIDA

COUNTY OF LAKE

BEFORE ME, personally appeared NANCY WINN EVERATT, who is one of the secretaries in the office of the State Attorney of the Fifth Judicial Circuit of Florida, the Honorable Gordon G. Oldham, Jr., in Leesburg, Florida, who, after being first duly sworn by me according to law, upon her oath deposes and says: That during the week of the 5th of March, 1962, said affiant did receive two calls from the secretary of Ernest D. Jackson, Sr. attorney for the above appellant; that at the time of the first telephone conversation after the call had been transferred to affiant by Mrs. Janice B. Mansfield, another secretary in the State Attorney's office, the caller asked as follows: Have you received the appeal papers in the Freedom Rider cases, and that's Callender, Smith and O'Connor, to which question affiant stated no. The next question was: Well, Mr. Musleh said that he would send you the papers and you should have received them by now, (or words to that affect). Affiant replied that this office had not received any papers in the cases. Then the caller said: Well, I wonder what Mr. Musleh thinks he's doing? and affiant replied: Well, I don't know. Where upon caller said Thank you and the conversation was ended.

At the time of the second call the caller identified herself again as the secretary of Ernest D. Jackson, Sr., attorney for the appellant in the above entitled cause, and asked basically as follows: I want to know if you received the papers in the Freedom Rider cases. Affiant replied that no papers had been received. The caller then said all right and thereupon the conversation ended.

That at the time of both calls Mr. Oldham was in fact not present in the office; that in fact the papers were not received by this office.

Affiant further states that at no time did the caller, or anyone, request that Mr. Oldham call Ernest D. Jackson, Sr., attorney for the appellant, collect or otherwise.

Dated: This the 15th day of March, 1962.

/s/ Nancy Winn Everatt
Affiant

Sworn to and subscribed before me this the 15th day of March, 1962.

/s/ Diana M. Mahoney (Seal)
Notary Public

My commission expires: August 8, 1965.

I DO HEREBY CERTIFY that a copy of the foregoing Re-Cross Affidavit has been furnished, by mail, to ERNEST D. JACKSON, SR., Attorney for Appellant, 410 Broad Street, Jacksonville 2, Florida, this the 15th day of March, A. D. 1962.

/s/ Gordon G. Oldham, Jr.
GORDON G. OLDHAM, JR.
Attorney for Appellee
Room # 1, Kilgore Building
Leesburg, Florida

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA, IN AND FOR MARION COUNTY

LESLIE LEE SMITH, Appellant, vs. STATE OF FLORIDA, Appellee.	Appeal from County Judge's Court, in and for Marion County

RE-CROSS AFFIDAVIT

STATE OF FLORIDA
COUNTY OF LAKE

BEFORE ME, personally appeared JANICE B. MANSFIELD, who is one of the secretaries in the office of the State Attorney of the Fifth Judicial Circuit of Florida, the Honorable Gordon G. Oldham, Jr., in Leesburg, Florida, who, after being first duly sworn by me according to law, upon her oath deposes and says: that during the week of the 5th of March, 1962, said affiant did receive three calls from the secretary of Ernest D. Jackson, Sr., attorney for the above appellant; that the caller asked for Mr. Oldham through the operator and when she was told he was not in, the said caller stated she would talk with affiant; that thereupon the secretary of Ernest D. Jackson, Sr. asked affiant if Mr. Oldham's office had received any papers in the Freedom Riders cases and recited the names of Smith, Callender and O'Connor; that affiant informed the caller she did not know but that possibly the secretary handling criminal matters could tell her, at which time the call was transferred to Mrs. Nancy Winn Everatt, another secretary in the State Attorney's office.

That at the time of the second call, neither Mr. Oldham nor Mrs. Everatt were in the office and the caller was advised that Mrs. Everatt would be in the office the next day.

That at the time of the third call the caller was told Mr. Oldham was not in, whereupon the caller asked to speak to the secretary handling criminal matters and was connected with Mrs. Everatt.

That in fact Mr. Oldham was not in the office at the time of any of the foregoing calls.

That at no time did the caller, or anyone, request that Mr. Oldham call Ernest D. Jackson, Sr., attorney for the appellant, collect or otherwise.

Dated: this the 15th day of March, 1962.

/s/ Janice B. Mansfield
Affiant

Sworn to and subscribed before me this the 15th day of March, 1962.

/s/ Diana M. Mahoney (Seal)
Notary Public

My Commission Expires August 8, 1965.

I DO CERTIFY that a copy of the foregoing affidavit was furnished by mail to Ernest D. Jackson, Sr., attorney for appellant, at 410 Broad Street, Jacksonville 2, Florida, this the 15th day of March, 1962.

/s/ Gordon G. Oldham, Jr.
GORDON G. OLDHAM, JR.
Attorney for Appellee
Room # 1, Kilgore Bldg.
Leesburg, Florida

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA, IN AND FOR MARION COUNTY.

Appeal from the County Judge's
Court, In and For Marion County.

LESLIE LEE SMITH,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

AFFIDAVIT

STATE OF FLORIDA
ss.
COUNTY OF LAKE

BEFORE ME, personally appeared GORDON G. OLDHAM, JR., State Attorney in and for the Fifth Judicial Circuit of the State of Florida, and as attorney for the State of Florida in the above entitled cause states that:

I. At the hour of 9:00 A.M. on the 9th day of March, 1962, no appellate proceedings had been served upon said Affiant or his office, as required by the Florida Appellate Rules and that certain Order Denying Motion to Dismiss, dated the 23rd day of February, 1962 and executed by the Honorable D. R. Smith, Circuit Judge;

2. That said Affiant received a copy of said Order Denying Motion to Dismiss, by mail, the 24th day of February, 1962. DATED THIS the 9th day of March, A.D. 1962.

/s/ Gordon G. Oldham, Jr.
Affiant

Sworn to and subscribed before me
this the 9th day of March, 1962.

/s/ Nancy Winn Everatt (Seal)
Notary Public

My commission expires: March 9, 1964.

I DO HEREBY CERTIFY THAT copy of the foregoing Affidavit has been furnished, by mail, to ERNEST D. JACKSON, SR., Attorney for Appellant, 410 Broad Street, Suite 208, Jacksonville, Florida, this 9th day of March, 1962, and that copy of the foregoing Affidavit has been furnished, by hand, to the Honorable D. R. Smith, Circuit Judge in and for the Fifth Judicial Circuit, State of Florida, Ocala, Florida, this the 9th day of March, A. D. 1962.

/s/ Gordon G. Oldham, Jr.
Gordon G. Oldham, Jr., Attorney

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF FLORIDA, IN AND
FOR MARION COUNTY.

Appeal from the County Judge's Court,
In and For Marion County.

LESLIE LEE SMITH,
Appellant,

-vs-

STATE OF FLORIDA,
Appellee.

ORDER DENYING MOTION TO DISMISS

This cause, on the 16th day of February, 1962, came on to be heard upon the Appellee's Motion to Dismiss appeal for failure of the Appellant to perfect his appeal in accordance with the requirements of the Florida Appellate Rules. Appearing at the hearing for the Appellee, the State of Florida, was the State Attorney of the Fifth Judicial Circuit of Florida, Gordon G. Oldham, Jr. Appearing for the Appellant, Leslie Lee Smith, was his attorney, Ernest D. Jackson, Sr.

At said hearing the Appellant's attorney admitted that no copies of appeal records had been served upon Gordon G. Oldham, Jr., State Attorney of the Fifth Judicial Circuit and, of course, the record shows no such service. The appeal records show that copies of all proceedings were furnished to the County Prosecuting Attorney, the trial attorney for the State in the trial court. All other requirements of the Rules were duly and timely met.

Rule 6.5 of the Florida Appellate Rules, and other rules following same relating to appellate procedures, require that copies of appeal records be served upon counsel for State when the defendant appeals. The attorney of record for the State of Florida in this proceeding could be no person other than the State Attorney for this judicial circuit, and by statute the State Attorney is so designated as the attorney to appear and defend such proceedings. It can only be concluded that counsel for appellant did not comply with the rules in this respect.

The Florida Appellate Rules, more specifically, Rule 6.13, gives the appellate court, if the appellant does not prosecute his appeal by the Rules, the authority to dismiss the appeal. This authority to dismiss the appeal rests largely within the sound discretion of the court. The exercise of this discretion is determined by consideration of pertinent factors, such as the substantiality of the question raised by the appeal, whether the appellee has been prejudiced by the appellant's neglect and the general bona fides of the appellant. Upon consideration of these factors, this Court has seen no prejudice done to the Appellee, the State of Florida, by reason of the Appellant's neglect. The failure of the Appellant to serve copies of appellate proceedings upon the State Attorney is unwarranted and indicates a gross misconception of terminology. This Court, however, feels that the Appellant's error was made in good faith since copies of all appellate proceedings were served by mail upon the County Prosecuting Attorney, the trial attorney for the State in the trial court.

Since this Court has concluded that the State of Florida has not been prejudiced and that the Appellant's neglect and failure to comply with the Rule was bona fide and in good faith, it is now, therefore

ORDERED AND ADJUDGED that the Appellee's Motion to Dismiss the Appellant's Appeal, by reason of his failure to comply with the requirements of the Appellate Rules, be, and the same is hereby denied. It is further

ORDERED AND ADJUDGED that the Appellant shall have ten days from the date of service of a copy of this Order upon him within which to supply Gordon G. Oldham, Jr., State Attorney, Fifth Judicial Circuit of Florida, with copies of all appellate proceedings, as required by the Florida Appellate Rules, failing in which this cause shall stand dismissed. It is further

ORDERED AND ADJUDGED that the Appellee shall, upon receipt of copies of appeal records from Appellant, as required by the Appellate Rules, have such time as is allowed by the

Rules within which to comply with the Rules as the same may relate to the Appellee.

DONE AND ORDERED in Chambers at Ocala, Marion County, Florida, this 23rd day of February, 1962.

/s/ D. R. Smith
CIRCUIT JUDGE

I HEREBY CERTIFY that on the 23rd day of February, 1962, I mailed a copy of this order to each of the addressees listed below:

/s/ D. R. Smith
CIRCUIT JUDGE

Addressees:

Gordon G. Oldham, Jr.
State Attorney, Fifth Judicial Circuit
Kilgore Building
Leesburg, Florida

Ernest D. Jackson, Sr.
Attorney at Law
410 Broad Street, Suite 208
Jacksonville 2, Florida

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA, IN AND FOR MARION COUNTY.

LESLIE SMITH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

NOTICE OF HEARING

TO: ERNEST D. JACKSON, SR.
Attorney for Appellant
410 Broad Street, Suite #208
Jacksonville, Florida

YOU WILL PLEASE TAKE NOTICE that the undersigned will call up for hearing Appellee's Motion to Dismiss Appeal, said Motion filed herein, before the Honorable D. R. Smith, Circuit Judge in and for the Fifth Judicial Circuit of the State of Florida, at the Court House in Ocala, Marion County, Florida, at the hour of 2:00 o'clock P. M. on the 16th day of February, A. D. 1962, or as soon thereafter as counsel can be heard.

GOVERN YOURSELF ACCORDINGLY!

/s/ Gordon G. Oldham, Jr.
GORDON G. OLDHAM, JR.
State Attorney
Room #1, Kilgore Building
Leesburg, Florida

I DO HEREBY CERTIFY that a copy of the foregoing Notice of Hearing has been furnished, by mail, to ERNEST D. JACKSON, SR., Attorney for Appellant, 410 Broad Street, Suite #208, Jacksonville, Florida, this the 8th day of February, A. D. 1962.

/s/ Gordon G. Oldham, Jr.
State Attorney

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR MARION COUNTY

LESLIE SMITH,

Appellant,

-VS-

STATE OF FLORIDA,

Appellee.

MOTION FOR CONTINUANCE

Comes now the Appellant, by and through his undersigned attorney and moves the Court for the entry of an Order in the above styled cause, continuing the hearing on Appellee's Motion to Dismiss the Appeall set on February 6, 1962, to a date after the second week of March, 1962, with the exception of March, 26-29, 1962, because the appellant's undersigned attorney will be out of the office on another trail in Tallahassee for a period of time extending to the last week of February, 1962, to the first week of March, 1962.

/s/ Ernest D. Jackson, Sr.
ERNEST D. JACKSON, SR.
Attorney for Appellant
410 Broad Street, Suite #208
Jacksonville, Florida

I HEREBY CERTIFY that a copy of the foregoing Motion for Continuance has been furnished to Gordon G. Oldham, Jr., State Attorney, Room #1, Kilgore Building, Leegsburg, Florida, by U. S. mail, this 1st day of February, 1962.

/s/ Ernest D. Jackson, Sr.
Attorney for Appellant

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT OF THE
STATE OF FLORIDA, IN AND FOR
MARION COUNTY

LESLIE SMITH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE COUNTY JUDGE'S COURT, IN AND FOR MARION COUNTY

NOTICE OF HEARING ON APPELLEE'S MOTION TO DISMISS THE APPEAL

TO: ERNEST D. JACKSON, SR.
Attorney for Appellant
210 Broad Street, Suite #208
Jacksonville, Florida

YOU WILL PLEASE TAKE NOTICE that the undersigned will call up for hearing Appellee's Motion to Dismiss the Appeal for Failure to Prosecute, said Motion filed herein, before one of the Circuit Judges of the Fifth Judicial Circuit of Florida, at the Court House in Ocala, Marion County, Florida, on the 6th day of February, A.D. 1962, at the hour of 2:00 P.M., or as soon thereafter as counsel can be heard.

PLEASE GOVERN YOURSELF ACCORDINGLY.

/s/ Gordon G. Oldham, Jr.
GORDON G. OLDHAM, JR.
State Attorney, Fifth Judicial Circuit
Room 1, Kilgore Building
Leesburg, Florida

I HEREBY CERTIFY that a copy of the foregoing Notice has been furnished to Ernest D. Jackson, Sr., attorney for appellant, 410 Broad Street, Suite #208, Jacksonville, Florida, this 26th day of January, 1962.

/s/ Gordon G. Oldham, Jr.

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT OF THE
STATE OF FLORIDA, IN AND FOR
MARION COUNTY

LESLIE SMITH,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

APPEAL FROM THE COUNTY JUDGES
COURT, IN AND FOR MARION COUNTY

MOTION TO DISMISS APPEAL FOR FAILURE TO PROSECUTE

Comes now GORDON G. OLDHAM, JR., State Attorney in and for the Fifth Judicial Circuit of the State of Florida, and moves to dismiss the appeal heretofore entered in the above styled cause by said Defendant LESLIE SMITH for the following reasons:

1. Said appeal has not been perfected according to the appropriate Florida Appellate Rules.

2. Said Appellant has not prosecuted said appeal as required by the Florida Appellate Rules.

DATED this the 26thday of January, A. D. 1962.

/S/ Gordon G. Oldham, Jr.
GORDON G. OLDHAM, JR.
State Attorney, Fifth Judicial
Circuit of Florida

I HEREBY CERTIFY that a copy hereof has been furnished to Ernest D. Jackson, Sr., attorney for appellant, 410 Broad Street, Suite #208, Jacksonville, Florida, by mail, on this the 26th day of January, 1962.

/S/ Gordon G. Oldham, Jr.

IN THE COUNTY JUDGE'S COURT
IN AND FOR MARION COUNTY, FLORIDA

THE STATE OF FLORIDA

-VS-

LESLIE SMITH,
Defendant.

NOTICE OF APPEAL

The defendant, Leslie Smith, takes and enters his appeal to the Circuit Court of the Fifth Judicial Circuit for Marion County, State of Florida, to review the virdict of the jury entered on July 5, 1961, the order denying the defendant's motion for a new trial, judgment and sentence imposed by the Court on July 17, 1961, and all parties to the said cause we called upon to take notice of the entry of this appeal.

Jackson and Shaw

/S/ Ernest D. Jackson, Sr.
Ernest D. Jackson, Sr.
Attorney for Defendant
410 Broad Street, Suite #208
Jacksonville, Florida

I hereby certify that a copy of this notice of appeal has been given to the prosecuting attorney by depositing into regular U. S. Mail this 29th day of July 1961.

/S/ Ernest D. Jackson, Sr.
Attorney for Defendant

IN THE COUNTY JUDGE'S COURT, MARION COUNTY, FLORID

STATE OF FLORIDA,)
SS.
COUNTY OF MARION.)

I Lewis O. Myers, Jr., County Judge in and for the County of Marion, State of Florida, do hereby certify that the foregoing is a true and correct copy of Notice of Appeal In Re: State of Florida Vs. Leslie Smith, Defendant.

as the same now appears of record and on file in said Court.

IN WITNESS WHEREOF: I have hereunto set my hand and the seal of the County Judge's Court, at Ocala, this the 3 day of August, A. D. 19 61.

/S/ Lewis O. Myers, Jr.
COUNTY JUDGE
MARION COUNTY, FLORIDA

IN COUNTY JUDGE'S COURT
MARION COUNTY, FLORIDA

STATE OF FLORIDA :
:
Vs. :
:
LESLEY LEE SMITH :
:
.. ..

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EXHIBIT NO. 1 14

STATE OF FLORIDA :
:
vs. : Charge: - Unlawful Assembly
:
LESLEY LEE SMITH :
Defendant :
:

Before me the undersigned County Judge for Marion County, State of Florida, personally appeared

H. A. Geiger

who being duly sworn, says:- That on the 16 day of the month of June A.D., 1961 in the County of Marion, State of Florida, one Lesley Lee Smith did, unlawfully meet with two other persons, to-wit: Herbert Ebnezer Callender and James Richard O'Connor to commit a breach of peace;

* * *

contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Florida.

Sworn to and subscribed before me
16 June A.D., 1961 H. A. Geiger

Lewis O. Myers, Jr. (Seal)
County Judge
Marion County, Florida

IN THE COUNTY JUDGE'S COURT
IN AND FOR MARION COUNTY,
FLORIDA

THE STATE OF FLORIDA

VS

LESLIE SMITH

Defendant

MOTION FOR NEW TRIAL

Comes now the defendant, Leslie Smith by his undersigned attorneys and respecfully move the court for a new trial upon the following grounds;

1. Prosecution failed to prove the elements of the charge to-wit unlawful assembly.

(a) The required number of persons under the statute to-wit three.

(b) A voluntary assembly of the parties.

(c) Any act on the part of the defendants that was inconsistent to peace.

2. The court erroneously construed Florida Statute 870.02 as prohibiting the attainment of a purpose lawful or unlawful while the Statute used in its text only the word "unlawful acts."

3. The court, in denying the defendant's motion for a directed verdict at the close of the state's case and at the close of the defendant's case, denied the defendant his constitutional right to peacefully use the bus terminal facilities on a non-discrimitory basis in voilation of the equal protection clause Fourteenth Amendment of the Constitution of the United States and in violation of the Interstate Commerce Act section 3 (1), 216 (d), 49 U.S.C.A. section 3 (1), 316 (d). and in violation of section fifteen of the Bill of Rights contained in the Constitution of the State of Florida.

4. That the sheriff and his deputies denied the plaintiff his Constitutional right to peacefully use the facilities of an interstate carrier bus terminal, while he was an interstate passenger traveling on said interstate carrier, in violation of the equal protection clause of the Fourteenth Amendment and in violation of

the Interstate Commerce Act section 3 (1), 216 (d). 49 U. S.C.A. section 3 (1), 316 (d).

5. The verdict of the jury was contrary to the evidence.

6. The evidence adduced to the trial was insufficient to submit the case to the jury.

7. The court erroneously applied Florida Statute 870.02 in violation of defendant's Federal Constitutional Rights to peacefully use the bus terminal facilities of an interstate carrier while the defendant was traveling as an interstate passenger. The use of said Statute as herein applied by the court and by the officers violates the equal protection clause of the Fourteenth Amendment and violates the Interstate Commerce Act, section 3 (1), 216 (d), 49 U. S.C.A. section 3 (1), 316 (d).

8. The court erroneously permitted the prosecuting attorney to go into details in connection with proported prior crimes committed by the defendant; notwithstanding, the defendant had not put in evidence his character, all of which prejudiced the defendant's case with extreneous and irrelevant evidence.

9. The court erroneously permitted the prosecuting attorney to degrade the character of the defendant in his argument to the jury by arguing the details of proported prior crimes and in arguing that the defendant is a British subject and not entitled to the equal protection of the law or the right to the same protection of rights secured to American citizens.

10. That the application of Florida Statute 870.02 so as to interfere with interstate travelers in the manner involved in this case is a plain violation of the Federal Interstate Commerce Act, in that it cast an undue barden upon Interstate Commerce.

11 11. The court prejudiced the defendant's case by refusing to grant the reading of the defendant's requested instructions to-wit one, two, and three.

Jackson and Shaw

By;/S/ Ernest D. Jackson, Sr.
Attorneys for Defendant
410 Broad Street
Suite 208
Jacksonville, Florida

I hereby certify that a copy of this motion has been mailed to the county prosecuting attorney by depositing the same in U. S. mail this 13th day of July 1961.

/S/Ernest D. Jackson, Sr.
ATTORNEY

IN COUNTY JUDGE'S COURT
MARION COUNTY, FLORIDA

State of Florida

Vs.

Lesley Lee Smith,
Defendant

Plea, Verdict, Judgment and Sentence

PLEA: Not Guilty

VERDICT: GUILTY

JUDGMENT: GUILTY AS CHARGED

SENTENCE: It is considered, Ordered and Adjudged that Lesley Lee Smith be confined to the Marion County Jail for a period of 30 days and pay a fine of $500.00; in default of payment of said fine he shall be confined to the County Jail for an additional period of 6 months.

Done, Ordered and Adjudged in open Court this 17 July 1961.

Lewis O. Myers, Jr. (Seal)
County Judge

IN THE COUNTY JUDGE'S COURT
IN AND FOR MARION COUNTY, FLORIDA

THE STATE OF FLORIDA

-VS-

LESLIE SMITH,
Defendant.

NOTICE OF APPEAL

The defendant, Leslie Smith, takes and enters his appeal to the Circuit Court of the Fifth Judicial Circuit for Marion County, State of Florida, to review the virdict of the jury entered on July 5, 1961, the order denying the defendant's motion for a new trial, judgment and sentence imposed by the Court on July 17, 1961, and all parties to the said cause we called upon to take notice of the entry of this appeal.

Jackson and Shaw

/S/ Ernest D. Jackson, Sr.
Ernest D. Jackson, Sr.
Attorney for Defendant
410 Broad Street, Suite #208
Jacksonville, Florida

I hereby certify that a copy of this notice of appeal has been given to the prosecuting attorney by depositing into regular U. S. Mail this 29th day of July 1961.

/S/ Ernest D. Jackson, Sr.
Attorney for Defendant

IN THE COUNTY JUDGE'S COURT
IN AND FOR MARION COUNTY, FLORIDA

STATE OF FLORIDA

VS

LESLIE SMITH
Defendant

ASSIGNMENT OF ERRORS

The defendant assign as the errors on which he intends to rely on in the Circuit Court for a reversal of the jury's verdict the judgement and the sentence appealed in this case which are as follows;

1. The court erred in denying defendant's motion for a directed verdict of acquittal at the close of the state's case.

2. The court erred in submitting the case to the jury for the reason that the evidence was insufficient to prove the elements of the crime charged against the defendant.

3. The court erred in its construction of Florida Statute 870.02 as prohibiting the attainment of a purpose lawful or unlawful while the statute used in its text only the word "unlawful Acts."

4. The court, in denying the defendant's motion for a directed verdict at the close of the defendant's case and at the close of the state's case, denied the defendant his Constitutional Rights to peacefully use the bus terminal facilities on a non-discrimitory basis in violation of the equal protection clause Fourteenth Amendment of the Constitution of the United States in violation of the Interstate Commerce Act section 3 (1), 216 (d), 49 U. S.C.A. section 3 (1), 316 (d), and in violation of section fifteen of the Bill of Rights contained in the Constitution of the State of Florida.

5. The court erred in denying the defendant's motion for directed verdict and the defendant's motion for new trial, in that the ruling of the court permitted the sheriff and his deputies to deny the defendant his constitutional rights to peacefully use the

facilities of an interstate carrier bus terminal while he was an interstate passenger traveling on said interstate carrier, in violation of the equal protection clause of the fourteenth Amendment and in violation of the Interstate Commerce Act section 3 (1), 216 (d), 49 U. S.C.A. section 3 (1), 316 (d).

6. The verdict of the jury was contrary to the evidence.

7. The evidence adduced to the trial was insufficient to submit the case to the jury.

8. The court erroneously applied Florida Statute 870.02 in violation of defendant's Federal Constitutional Rights to peacefully use the bus terminal facilities of an interstate carrier while the defendant was traveling as an interstate passenger. The use of said Statute herein applied by the court and by the officers violates the equal protection clause of the Fourteenth Amendment and violates the Interstate Commerce Act, section 3 (1), 216 (d), 49 U.S.C.A. section 3 (1), 316 (d).

9. The court erroneously permitted the prosecuting attorney to go into details in connection with proported prior crimes committed by the defendant; notwithstanding, the defendant had not put into evidence his character, all of which prejudiced the defendant's case with extreneous and irrelevant evidence.

10. The court erroneously permitted the prosecuting attorney to degrade the character of the defendant in his argument to the jury by arguing the details of proported prior crimes and in arguing that the defendant is a British subject and not entitled to the equal protection of the law or the right to the same protection of rights secured to American citizens.

11. That the application of Florida Statute 870.02 so as to interfere with interstate travelers in the manner involved in this case is a plain violation of the Federal Interstate Commerce Act, in that it cast an undue burden upon Interstate Commerce.

Jackson & Shaw

By:/S/ Ernest D. Jackson, Sr.
Attorneys For Defendants
410 Broad Street Suite #208
Jacksonville, Florida

I hereby certify that a copy hereof has been sent to the prosecuting attorney by depositing the same in U.S. mail this 29th day of July 1961.

/S/ Ernest D. Jackson, Sr.
Attorney For Defendant

DEFENDANTS REQUESTED INSTRUCTION NO. I

The Court further instructs you that if you find that the defendant is an interstate passenger traveling on a bus that stopped at a regular bus terminal and if you find that the defendant was in the process of using the facilities of said bus terminal in an orderly non-violent manner, you must find that the defendants were legally upon the premises of the bus terminal and they had a Federal right to remain on said premises under authority of law.

Denied

DEFENDANTS REQUESTED INSTRUCTION NO. II

The Court further instructs you that if you find that the defendant is an interstate passenger traveling on a bus that stopped at a regular bus terminal and if you find that the defendant was in the process of using the facilities of said bus terminal in an orderly non-violent manner, you must find that the defendants were legally upon the premises of the bus terminal and they had a Federal right to remain on said premises under authority of law and if you further find that the defendant was ordered by a Deputy Sheriff to get off the premises of the bus terminal or to get on the bus and that he refused to do so, that the defendant had a right to refuse to leave the premises of the bus terminal or to refuse to reboard the bus until he had had an opportunity to peacefully use the facilities of the bus terminal.

Denied

DEFENDANTS REQUESTED INSTRUCTION NO. II

The Court further instructs you that if you find that the defendant is an interstate passenger traveling on a bus that stopped at a regular bus terminal and if you find that the defendant was in the process of using the facilities of said bus terminal in an orderly non-violent manner, you must find that the defendants were legally upon the premises of the bus terminal and they had a Federal right to remain on said premises under authority of law and if you further find that the defendant was ordered by a Deputy Sheriff to get off the premises of the bus terminal or to get on the bus and that he refused to do so, that the defendant had a right to refuse to leave the premises of the bus terminal or to refuse to reboard the bus until he had had an opportunity to peacefully use the facilities of the bus terminal.

Denied

IN THE COUNTY JUDGE'S COURT
IN AND FOR MARION COUNTY, FLORIDA.

THE STATE OF FLORIDA

VS

LESLIE LEE SMITH
Defendant.

DIRECTIONS TO THE CLERK

The Clerk of the County Judge's Court is hereby requested and directed to make up the record in the above styled case and certify the same to the Circuit Court of the Fifth Judicial Circuit for Marion County. The following pleadings are hereby requested to be included in said report;

1. The information filed by the County prosecutor against the defendant charging the defendant with unlawful assembly.

2. The transcript of testimony filed by the court reporter of the trial proceedings.

3. All Exhibits introduced into evidence by the State and the defendant.

4. The motion for new trial filed by the defendant.

5. A copy of the court's order adjudging the defendant guilty and the sentence and fines imposed by the court.

6. The defendant's notice of Appeal.

7. A copy of these directions to the Clerk.

8. A copy of the defendant's assignment of errors.

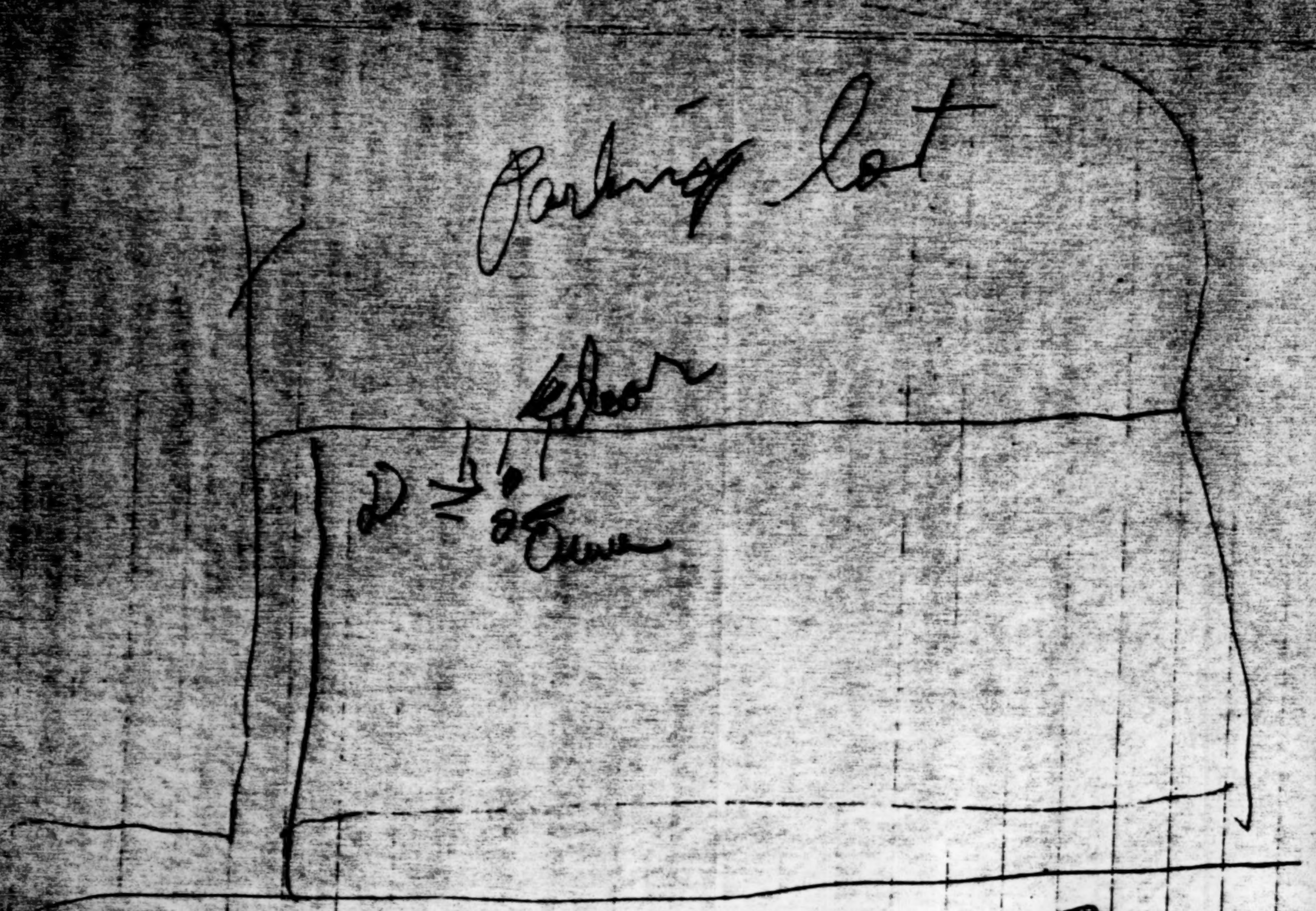
9. A copy of the defendant's requested instructions that were denied by the court.

Jackson & Shaw

BY; /S/ Ernest D. Jackson, Sr.
Attorneys for Defendant
410 Broad Street Suite #208
Jacksonville, Florida

I hereby ceritfy that a copy of these directions has been sent to the County prosecuting attorney by depositing the same in U.S. mail this 29th day of July 1961.

/S/ Ernest D. Jackson, Sr.
ATTORNEY


Parking lot
Officer
D
Owen

John Owen

MARKED FOR IDENTIFICATION AS
Defendants EXHIBIT NUMBER 1
Lesley Lee Smith – Unlawful Assembly
W. C. MYERS, JR.
COUNTY JUDGE
MARION COUNTY, FLORIDA

IN THE COUNTY JUDGE'S COURT, MARION COUNTY, FLORIDA

STATE OF FLORIDA,)
SS.
COUNTY OF MARION.)

I Lewis O. Myers, Jr., County Judge in and for the County of Marion, State of Florida, do hereby certify that the foregoing is a true and correct copy of Transcript of the record of the judgment in the case of the State of Florida Vs. Lesley Lee Smith, pages numbered 1 to 14 inclusive, and the transcript of testimony as taken by Court Reporter;

as the same now appears of record and on file in said Court.

IN WITNESS WHEREOF: I have hereunto set my hand and the seal of the County Judge's Court, at Ocala, this the 29 day of August, A. D. 19 61.

/S/ Lewis O. Myers, Jr.
COUNTY JUDGE
MARION COUNTY, FLORIDA

[illegible]

[illegible] Sir:

[illegible] filed [illegible]

[illegible]

Enclosure

LESLIE LEE SMITH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

TRANSCRIPT OF TESTIMONY

VOLUME II

PETITION FOR WRIT OF CERTIORARI

TO THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR MARION COUNTY, FLORIDA.

Ernest D. Jackson, Sr.
410 Broad Street, Suite 208
Jacksonville, Florida

For Petitioner

Hon. Richard W. Ervin, Esq.
Attorney General
State of Florida
Tallahassee, Florida

For Respondent

IN THE COUNTY JUDGE'S COURT, IN
AND FOR MARION COUNTY, FLORIDA.

STATE OF FLORIDA,)
:
PLAINTIFF,)
:
-vs-)
:
REV. LESLEY LEE SMITH,)
:
DEFENDANT.)

.. ..

TRANSCRIPT OF TESTIMONY

MRS. ELVA C. WOODIS
OFFICIAL COURT REPORTER
OCALA, FLORIDA

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H. A. GEIGER

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IN THE COUNTY JUDGE'S COURT, IN
AND FOR MARION COUNTY, FLORIDA.

STATE OF FLORIDA,)
:
Plaintiff,)
:
-vs-)
:
REV. LESLEY LEE SMITH,)
:
Defendant.)
.. ..:

TRANSCRIPT OF TESTIMONY

A trial of the case of STATE OF FLORIDA -vs- REV. LE LESLEY LEE SMITH was held on the 5th day of July, 1961, before the Honorable Lewis O. Myers, County Judge, in Ocala, Florida, and a jury.

Before a jury was duly accepted and sworn, the following proceedings were had:

BY MR. MUSLEH: Prior to the trial of the defendant, Lesley Lee Smith, on a charge of unlawful assembly, the State would like to dictate into the record now there's present in this court now, Elva C. Woodis, who is the official court reporter of the Fifth Judicial Circuit of Florida and as such court reporter for this court, the State now has no objections whatsoever to counsel for the defendant having any other person in the courtroom to take the testimony; however, the State does interpose an objection for the use of any transcript of this trial other than the transcript of the official court reporter and with that we are ready to proceed to trial.

BY MR. ERNEST JACKSON: Your Honor, before proceeding with the charge that has been labeled as "Unlawful Assembly", the defendant would make a motion that both the charge of unlawful assembly and the charge of failure to obey a police officer be combined and tried at the same time on the grounds that the facts and circumstances are identical and the charges are brought

I believe, in connection with the same set of facts and same acts. I believe that it would be to the best interest of the State to try these cases together rather than to try them over a protracted period of time.

MR. MUSLEH: Your Honor, if it had been in the best interest of the State, the State would have moved so to start off with. Your Honor, there is a different law and different statute. We are now trying unlawful assembly which is under 870.02. The facts which the State is required to prove before the jury can render a verdict of guilty is substantially different altogether than the companion charge in this case of resisting the orders of an officer. Therefore, the State cannot combine these two charges at all as the jury would have to try to dissect the facts which would apply to one charge and to dissect those facts as applied to the other charge. The courts have pretty well set out what the burden of proof is on an unlawful assembly. The State now is ready to try that one charge and there was no prior motion for consolidation prior to the time of trial right now, so counsel didn't see fit to file that motion until this time, and the State is now ready to proceed with the one charge of unlawful assembly. We want to go to trial on that.

MR. JACKSON: If I may ask the State Attorney---I mean the County Solicitor this one question: As to whether or not he is trying the charge of unlawful assembly under Florida Statute 870.02 and the charge of failing to obey the orders of a police officer under Florida Statutes 870.04?

MR. MUSLEH: I don't think the County Solicitor is under cross examination by Mr. Jackson or anyone else.

MR. JACKSON: It is not a cross examination, but a question of interest to determine the defenses of the defendant, and I think it is important that the State decide whether or not they are trying a case under one statute or under another. I don't see anything like----

MR. MUSLEH: We're trying it on the charge of unlawful assembly and the applicable statute thereto, of unlawful assembly.

THE COURT: The counselor has stated he is trying the case of unlawful assembly under 870.02.

MR. JACKSON: Yes, sir, and my next question, Your Honor, was whether or not the second charge of failing to obey a police officer falls under Florida Statute 870.04, as a matter of informing the defendant as to the proper defense in the case.

MR. MUSLEH: I'm not concerned with that charge, Your Honor. I'm only concerned with the one that is before the court now.

THE COURT: The court is going to deny the motion to consolidate the cases. The court will instruct the attorney for the State to furnish the defendant's attorney with a copy of the information.

MR. MUSLEH: I will, prior to trial. I will be glad to do that. We are ready to proceed with this case, Your Honor.

THE COURT: Alright, call the jury.

(Thereupon the jury was duly accepted and sworn at 10 minutes to 3:00 P.M.)

BY THE COURT: (Swearing the jury)

BY MR. MUSLEH: Your Honor, the State would now like to ask for a 10 minute recess at this time.

BY THE COURT: All right, we will be in 10 minute recess.

BY MR. MUSLEH: The State will concede that the jury is in the box.

BY MR. JACKSON : Your Honor, the defense will request the rule.

BY MR. MUSLEH: All right, will the defense concede that the jury is in the box?

BY MR. JACKSON: Yes, sir.

BY MR. MUSLEH: All right, the list of witnesses for the State are: Mr. H. A. Geiger, Mr. Doug Willis, and John H. Owens, J. A. Windsor, T. W. Penuel. I ask the defendant now for his list of witnesses:

BY MR. JACKSON: Your Honor, we have two witnesses, Mr. Bennie Winston and Dr. Daniel Stern.

BY THE COURT: The Court is placing you under the rule which means you will remain within a calling distance, but without hearing distance to this court room. You will not discuss with anyone, other than the attorney for the defendant or the attorney for the state any facts that you testify about, or have testified about until the conclusion of this trial. When the arguments to the jury begin, you may at that time return to the courtroom. The bailiff will come and inform you of that fact. Now, the court will swear each and every one of you at this time in order to facilitate the trial. Will you each raise your right hand. Do you solemnly swear that the testimony that you shall give in this cause to be the truth, the whole truth and nothing but the truth, so help you God?

(All nodded in the affirmative.)

All right, you may now retire from the courtroom.

BY MR. MUSLEH: Calling Mr. Geiger.

MR. H. A. GEIGER, being first duly sworn as a witness, testified as follows:

DIRECT EXAMINATION

Q. **BY MR. MUSLEH:** State your name, please.

A. H. A. Geiger.

Q. And your profession or occupation?

A. Deputy Sheriff of the Marion County Sheriff's Office.

Q. Do you hold any official position other than just as deputy sheriff, sir?

A. Chief deputy.

Q. Mr. Geiger, were you a deputy sheriff on the 16th day of June, 1961?

A. Yes, sir.

Q. Here in Marion County, Florida?

A. Yes, sir.

Q. On that date were you holding the position as Chief Deputy Sheriff?

A. Yes, sir.

Q. How long have you been a deputy sheriff?

A. Since January 3rd, of '61.

Q. Prior to that time you had law enforcement experience?

A. Yes, sir.

Q. Would you state for the record what it was, sir?

A. I was detective captain with the Ocala Police Department for approximately 5 years.

Q. And from the Ocala Police Department did you go to the Sheriff's Office here in Marion County?

A. Yes, I did.

Q. Now, on the 16th day of June of 1961, did you see the defendant here, Lesley Lee Smith, in Marion County, Florida?

A. I did.

Q. Where did you see him at, Mr. Geiger?

A. At the bus station on North Magnolia Street.

Q. Is that here in Ocala, Florida?

A. Yes, sir.

Q. Approximately what time of day or night was this when you first saw the defendant?

A. Approximately 12:30 or 12:45.

Q. Noon?

A. Yes, sir.

Q. Will you state to the court now under what conditions did you first see the defendant at the bus station in Ocala, Florida?

A. When I first seen the defendant, he was approximately 3 or 4 feet inside of the ticket office of the bus station. He'd entered by the west door.

Q. Was there any commotion or cause there which gave you reason to----

BY MR. JACKSON: Objection, your Honor. I think counsel should limit his questions to this witness as to what happened. I think the question he has just mentioned is certainly leading in that respect.

BY MR. MUSLEH: Counsel hasn't even heard my question yet.

BY THE COURT: You may rephrase the question.

Q. **BY MR. MUSLEH:** Now, was this defendant in the bus station involved in any act which caused your attention at that time which resulted in your arrest of the defendant?

BY MR. JACKSON: Again I rise to object to the question as being leading. He can ask the witness, your Honor, what first attracted his attention to this defendant, whether there was an act or incident or something of that sort, I think that is leading.

BY MR. MUSLEH: Your Honor, he's charged with unlawful assembly so the question has to be in correlation with the charge.

BY THE COURT: The court is going to sustain the objection.

Q. **BY MR. MUSLEH:** What happened at the bus station at the time you saw this defendant?

A. What attracted my attention was the fact that there was approximately 6 or 7 people just inside the door, I heard some loud talk and I seen a couple of men somewhat tussling, their arms---one pushed the other or something. I was approximately 15 feet from this location and I hurried over to it and asked them what was wrong. I identified myself and was told by one of the persons there that another person had stepped on his foot.

Q. Now, let me ask you something. Right at that time were you at the bus station in Ocala, Florida?

A. I was, sir.

Q. Why were you at the bus station in Ocala, Florida, on this particular time?

A. We had had officers there off and on since 9:00 o'clock that morning.

Q. For what purpose?

A. Well, we'd had prior information from Jacksonville that there were freedom riders coming in and we were there to see that there would be no trouble, no one injured in any way whatsoever.

Q. Were you there to prevent any violence?

A. Prevent any violence, any violation of the law.

Q. Now, will you sort of pick up where you left off, when you saw this group of 6 or more there tussling and some loud talk? Would you pick up from there?

A. After I identified myself there were other people in the waitingroom, I told them to come outside and we'd get it straightened out. All right, I had a little trouble convincing several of them to come outside. I had some other officers there that got the other people back out of this area and I got these 6 people outside.

Q. What 6 people went outside with you?

A. Well, there was one was named Challender, O'Connor, Smith, Penuel, Owens, and Windsor.

Q. All right, now, did you prior to the time of getting those 6 people out ask any of the other people in there to leave?

A. I had some officers that told them to leave, yes, sir.

Q. Did everybody disperse?

A. Yes, sir, all but these 6.

Q. All right, what happened when--- Was Lesley Lee Smith one of the 6 you're referring to, the defendant here at the table?

A. He was.

Q. Now, did you go outside with Lesley Lee Smith and the other 5 whom you've named?

A. I did.

Q. What happened there?

A. Outside there was still some arguing, so I told---I found out that 3 of them was from Ocala or Marion County. I told them to get off the premises.

Q. Was that off the premises of the bus station?

A. Off their property altogether. One of them said something about staying on the sidewalk. I said get off the sidewalk and the premises of this car altogether and leave. The sheriff was there at that time. They left. I told these 3 that they would have to leave. They had advised me previously that they were passengers on the bus. I told them to get back on the bus and stay until time to leave, that we didn't want any trouble.

Q. Now, let me ask you this. Were there other passengers or freedom riders on the bus that were inside the cafeteria at this particular time?

A. Yes, sir.

Q. And there was nothing at all---your directions did not go to them, is that correct?

A. No, sir.

Q. Do you know approximately how many of this same group were inside the cafeteria at this time?

A. I'm only positive of 3, sir.

Q. Three more other than this?

A. Yes, sir.

Q. Had you been at the bus station when another group of riders had arrived prior to that time?

A. No, sir, I was not there.

Q. Were you there during the day that any other group of riders was there?

A. Yes, sir.

Q. Was there any incidents at all that occurred during the day other than what you've testified to, to your knowledge?

A. No, sir.

Q. Now, did you have any reason to believe at the time you saw this tussling and this argument that any possible trouble, such as a riot would have ensued had you not dispersed the crowd?

A. Yes, sir.

Q. Would you tell us what you based that on?

A. Well, there had been several people that talked to me prior to the arrival of the bus, who were antagonistic; they were unsympathetic toward this group and what their functions were. Several of them had talked about trouble. One person at the bus station advised me that there had been people there who said that we'd had one group but we wouldn't have any more.

Q. You had reasons to believe then upon what you heard prior to that time and actually what you saw down there that the possibility of a riot would have ensued?

A. Yes, sir.

Q. Now why, why, Mr. Geiger, did you ask these people to disperse? I'm talking about all 6. Why did you ask the 3 from Ocala to leave the bus station, why did you ask the 3 freedom riders to get back on the bus?

A. To prevent any riot or anyone receiving any physical damage or anything else, to prevent any violation of the law.

Q. Did you actually see any tussling or any shoving which occurred just prior to the time that you moved there to disperse the crowd?

A. Yes, sir.

Q. Will you tell the jury now what you actually saw there as best you can recollect?

A. Well, what first attracted my attention was the loud words. When I looked over in this direction, I seen persons later identified to me as O'Connor and Owens who were pushing each other. It was nothing serious but they had pushed each other. They were making efforts to push each other, and those were the first two that I separated.

Q. Identify for the jury O'Connor and Owens. Is Owens the local man and O'Connor was one of the freedom riders?

A. That's true.

Q. All right, go ahead.

A. After I got them halfway quiet I stopped the pushing. I identified myself and by asking them 2 or 3 times I got them outside of the bus station door on the loading ramp there. It was at that time that I found out that Owens claimed that one of these persons had stepped on his foot and he was going to apologize or he was going outside with him. Owens was a little angry so, at that time, to keep any other people from congregating and to prevent any trouble, I asked all of them to leave. My instructions to them were reinforced by the sheriff. At that time we got Owens, Penuel and Windsor to leave the bus station area. The other three were still there and at least three times after I had advised them that they would be placed under arrest if they didn't get back on the bus, they refused to get on the bus, so after a minimum of three times I called for a car to come up, they were placed under arrest and carried down to the county jail.

Q. Mr. Geiger, at the time you ordered the 6, the 3 Ocala men and the 3 freedom riders, were or was the defendant at the table here, Lesley Smith, attempting to use any of the facilities of the bus station in a non-violent, peaceful manner at that particular time?

A. At the time I was talking with him he wasn't.

Q. He was not?

A. No, sir.

Q. And at the time you observed him, at the time this commotion was going on, where were they at in the bus station itself?

A. In the ticket office there.

Q. Mr. Geiger, where did the bus itself park at the bus station?

A. The bus parked in the regular parking area for buses on the west side of the bus station.

Q. There's also parking area for the buses on the north side of the bus station, is there not?

A. Yes, sir.

Q. Now, when the bus pulled in to the west side of the bus station, where did the defendant Smith enter the bus station? What door did he enter?

A. He entered a door on the west side of the bus station, nearest the south end of the bus station.

Q. What facility is there at all where he entered the bus station?

A. Nothing except the ticket desk.

Q. The ticket desk is to the left as you enter the west door of the bus station?

A. Yes, sir.

Q. Where is the cafeteria with reference to the ticket desk?

A. The cafeteria is directly east from the ticket.

Q. At the time of the commotion and the incident which you've testified to that caused you such apprehension as you ordered a dispersal of the people, was the defendant Smith attempting to use the cafeteria area?

A. No, sir.

Q. At that particular time were there other members of this so-called freedom rider group that were actually using the cafeteria area?

A. There was one colored woman and one white woman that had already passed me and gone in to the dining area itself.

Q. Did you order them to leave there?

A. No, sir.

Q. Was there any order at all given to them by you?

A. No, sir.

Q. Or by any other officer?

A. None whatsoever.

Q. Other than the ticket window---where is the baggage window with reference to the ticket window?

A. Well, you can get baggage at the ticket desk and you can also get it at a door on the outside of the building proper on the west side where the buses pull in.

Q. Now, is there a waiting room in the area where the ticket desk is, where you saw these defendants?

A. Yes, sir.

Q. Is there seating facilities in the waiting room area?

A. Yes, sir.

Q. Were the defendants attempting to use the seating facilities?

A. No, sir.

Q. Are there bathrooms at the bus station?

A. Yes, sir.

Q. Were the defendants attempting to use any of the bathroom facilities, this defendant here, Smith, at the time that you ordered them dispersed?

A. No, sir.

Q. In other words, now, Mr. Geiger, they were attempting to use no facilities of the bus station at the time you asked them to disperse and at the time you were apprehensive of a riot developing, is that correct, sir?

A. That's true, sir.

Q. Did you say anything to the defendant here, either individually or collectively, about leaving the premises?

A. Yes, sir.

Q. Did you give him any alternative other than leaving the premises other than getting on the bus?

A. I told him he could leave the premises and when they advised me they came in on the bus, then I told them they could get back on the bus and stay on the bus until it left.

Q. How many times did you advise this defendant to get back on the bus or leave the premises?

A. A minimum of a half a dozen times and at least three times after they had been advised that if they didn't get back on the bus that they would be arrested.

Q. Now, to get the record straight, you advised this defendant at least 6 times to get back on the bus or leave the premises, is that right?

A. Yes, sir.

Q. After the sixth time, Mr. Geiger, did you then mention an alternative of being arrested?

A. I told them at that time that they were under arrest.

Q. Did you advise them that if they did not remove themselves you would place them under arrest?

A. Yes, sir.

Q. Did that same bus leave with the rest of the freedom riders who came in to Ocala on that day?

A. I'm sure that there was two got on the bus before it left. That's all I was positive of because I didn't know all of them.

Q. How many groups of so-called freedom riders were in the Ocala bus station on the date in question?

A. There was 3 groups, 3 different groups. There was one group that came, had a 2 hour layover, went someplace in Ocala and came back to the bus station and waited, so there was 4 separate times that freedom riders were in the bus station.

Q. And there was no incident at all to your knowledge other than the one this so-called Reverend Lesley Lee Smith was involved in, is that right?

A. That's true.

Q. I'm going to ask you a question and, please, Mr. Geiger, don't answer it until counsel has had the opportunity to object to this question. Isn't it a fact that negroes had been served in the bus station cafeteria in Ocala, Florida, even prior to the date that the freedom riders had came into Ocala, Florida?

A. That's true, sir.

BY MR. MUSLEH: You may inquire.

CROSS EXAMINATION

Q. **BY MR. JACKSON:** Mr. Geiger, I believe you stated a moment ago that the first time that you saw the defendant you saw some persons scuffling. Did you see this defendant scuffling?

A. I don't believe it was him. He was in the area, but there was a group there, and the ones I seen was O'Connor and Owens.

Q. Did you see this defendant scuffling with anyone at that time?

A. Not so far as I know, but they were in a cluster and I couldn't swear that this defendant was scuffling.

Q. As a matter of fact, you didn't see him put his hand on anyone, did you?

A. No, I didn't.

Q. However, you say at that particular time you saw, I believe, Mr. Owens and Mr. O'Connor struggling, is that right?

A. It was a minor thing.

Q. A minor skirmish?

A. Yes.

Q. About how far inside of the bus terminal ticket area was this defendant when you saw him?

A. Three to five feet.

Q. You said a moment ago that the defendant here was not attempting to use any facilities of the bus company, is that right?

A. That's true.

Q. What facility is located within 5 feet of the entrance of the bus terminal?

A. Nothing except the floor.

Q. In other words, he'd have to progress or walk further into the terminal before he could use any facility, isn't that true?

A. That's true.

Q. Isn't it also true that before he got inside of the bus terminal that his progress was impeded, isn't that true?

A. Not to my knowledge. I did not see him outside the bus station, prior to the incident.

Q. No, I say this skirmish you say took place just inside of the door of the bus terminal and ticket area?

A. That's true.

Q. If I understand you correctly that there were no bus facilities within that immediate 5 feet that he could use?

A. There's a water fountain sitting just inside the door.

Q. In other words, in order to reach the ticket window, he would have to be able to come further into the bus station, isn't that true?

A. That's true.

Q. And to go over into the seating area he would have to progress further into the bus terminal?

A. Coming through that particular door, that's right.

Q. And to go into the cafeteria, couldn't he leave from there on into the cafeteria on the other end?

A. That's true.

Q. Then when you say that the defendant was not attempting to use facility, you mean that at that spot he was not attempting to use any facility, but you couldn't under oath to this jury say that he did not enter there with the intention of using other facilities that were in there, could you?

A. I couldn't testify as to his intentions.

Q. I understand. In other words, what you're telling this jury is that the spot that he had reached inside the terminal at the time this turmoil developed at the door there he was not far enough inside the bus terminal to use any facility except the one you said which was the water fountain, is that right?

A. At the time of the incident he had not attempted to use anything and, as I say, I cannot testify as to his intentions.

Q. I see. So you can't testify as to whether he was attempting to use anything, can you?

A. That's true.

Q. Now, I believe you testified that you had heard individuals at the bus terminal talking about what would happen if another group of so-called freedom riders attempted to use the facilities there, is that right?

A. That's true.

Q. Was Mr. Owens one of those individuals?

A. I had not seen Mr. Owens until the time I seen he and the other 5 people at the door. In fact, I didn't know Mr. Owens.

Q. Did you try to ascertain whether or not Mr. Owens was in the bus terminal for the purpose of using the bus terminal as an interstate passenger?

A. That particular day the only persons we questioned were those that were talking, and their talk was such that would give us reason to believe that they might cause trouble. Those persons-

BY MR. JACKSON: No, you're not--- Objection---

BY MR. MUSLEH: I object to you cutting him off of his question. You let him finish his answer.

BY MR. JACKSON: Your Honor, I want my answer to be responsive to my question, and I think I'm entitled to that.

BY THE COURT: Would you read the question?

COURT REPORTER: "Q. Did you try to ascertain whether or not Mr. Owens was in the bus terminal for the purpose of using the bus terminal as an interstate passenger?"

BY THE COURT: You may answer that question.

A. I did not see Mr. Owens prior to that time.

BY MR. MUSLEH: Now, your Honor, the answer which he previously given is still part of the record.

BY MR. JACKSON: The answer which he given I asked to be stricken from the record as being non-responsive to my question.

BY MR. MUSLEH: The court hasn't ruled on it and, naturally, you know I object to that. He answered your question. The answer, your Honor---the testimony we have reference to is the testimony that he and the officers questioned every person within the bus station that gave them any reason to believe that any difficulty may arise. I think that was in response to his question.

BY THE COURT: The court is going to deny the motion.

BY MR. JACKSON: Your Honor, I wish your Honor would understand---

BY THE COURT: Would you like to argue the motion?

BY MR. JACKSON: No, sir, this is what I'm trying to say. My first question I asked him---he gave a complete answer on that. Then I asked him a second question and he was, in responding to that question, started mentioning something else and I said that was not responsive to that question. I think I have a right to limit the witness to respond to the question that I ask at the time I ask it.

BY THE COURT: Yes, sir.

BY MR. MUSLEH: Your Honor please, I don't believe counsel or any other attorney has the right to ask a witness a question and let the witness answer only so much of that question that is favorable to counsel and then, all of a sudden, to stop him and not let him finish his answer.

BY THE COURT: Let the jury go to the jury room for about 2 minutes.

BY MR. MUSLEH: Your Honor, let me say this. In order to conserve time, I'll withdraw it. Let's proceed. I withdraw any objections from the record.

BY THE COURT: All right. Then that portion of the answer---What I was trying to get was the portion of the answer to be stricken.

BY MR. MUSLEH: Well, we withdraw any objection. He can strike the answer in its entirety.

BY THE COURT: For the jury to hear it, it would only repeat it.

BY MR. MUSLEH: Well, as to counsel's motion to strike the State concedes in it.

BY THE COURT: All right. I hope you all don't get in an argument later about what was stricken. All right.

BY MR. JACKSON: Thank you, sir.

Q. Mr. Geiger, after you had talked, you said with the people, with this defendant and the other 5 persons who were at the door, you said you asked them to come outside of the terminal and building and that they went outside, is that correct?

A. That's true.

Q. Now, you said, I believe, that you told the other local individuals to leave the premises of the bus terminal and you also told this defendant to leave the premises of the bus terminal, and that the 3 local citizens did leave the bus terminal, is that correct?

A. That's true.

Q. I ask you, sir, what danger existed at that time that would make it impossible for this defendant to continue to use the facilities of the bus terminal?

A. Well, at that particular time I had given all persons the prerogative of leaving or going to jail.

Q. In other words, your testimony, if I understand it correctly, you say that after you talked with them inside the bus terminal and they had moved outside of the bus terminal but were still on the grounds of the bus terminal, you ordered the other three gentlemen to leave. You then ordered them back into the bus.

A. That's true.

Q. Well, what danger existed at that time?

A. Well, neither group went out the first time I told them to go out of the bus station and outside I convinced both groups or attempted to convince both groups that all of them were leaving, both the locals and the people that came on the bus. I told all of them that they were going to leave. I think I had a perfect right. We didn't want a riot there. I got the local people to leave first, one of them was escorted off. When he attempted to turn around, an officer told him to leave and he did leave. Then I proceeded with these three to get them on the bus. They continued to refuse, therefore, the arrest.

Q. What I'm trying to say---I'm asking you, sir, what danger existed then?

A. After that time?

Q. Yes, sir.

A. If I had let these three stay there, the other three walking down the street turned around and seen them, in all probability they would have returned.

Q. In other words, did you take into consideration that this defendant had been traveling on the bus?

A. Did I take that into consideration?

Q. Yes.

A. Surely.

Q. And that this was a regular bus terminal?

A. That's true.

Q. And that he wanted to go in and use the facilities there?

A. I considered that.

Q. And you felt that you would tell him to get back on the bus without giving him an opportunity to use the facility in the manner he wanted to use it?

A. I also assumed that the other 3 or the other 5 wanted to use the bus.

Q. Wanted to do what?

A. I also assumed that all 6 persons there wanted to use the bus facilities or they wouldn't have been there.

Q. Then I ask you this question. Did you ask them whether or not, these other 3 men, whether or not they were in the bus terminal for the purposes of using the bus and bus facilities as a intra or interstate passenger?

A. That was no concern of mine.

Q. So you didn't ascertain that?

A. No, I didn't.

Q. Did this defendant tell you that he was then in the travel of the bus----

A. I was told by one of the 3 that they were I.C.C. passengers and they wanted to eat.

Q. And you told them to go get back on the bus?

A. I told them they would have to eat someplace else. We wanted no further trouble there. They would have to get on the bus or leave the bus facilities.

Q. Now, at the time you saw the scuffle developed at the door you said you saw only two men scuffling?

A. That's all I could testify to.

Q. You didn't see the defendant grab hold of anybody or attempt to assist the man that was scuffling, did you?

A. I did not see him do anything. All I know is hearsay from another person that was involved, but I didn't see the defendant push anyone.

BY MR. JACKSON: That's all.

REDIRECT EXAMINATION

Q. BY MR. MUSLEH: Mr. Geiger, I'm no Michael Angelo, but in the bus station, assuming this is the west door, the bus parked in this vicinity, as you walk through the west door is not the restroom facilities immediately to the right as you go into the west door?

A. Yes, sir.

Q. Is not the water fountain facility immediately here to the right as you walk in the door?

A. That's true.

Q. Is not the baggage facilities immediately on the left as you walk in the door, where there's an opening there for your baggage?

A. There's an opening about 2 feet inside for it.

Q. Beyond that is there a sort of oval area where you buy your tickets?

A. Yes, sir.

Q. The restaurant facility would be to the east of that, is that right?

A. Yes, sir.

Q. Was the defendant here attempting to go any place and being restrained from going by any person when you observed this confusion you've testified to?

A. Not to my knowledge.

Q. Mr. Geiger, when you asked all of these people to leave, did you feel at that time that the same law under which you asked these white people to leave was also applicable to ask the freedom riders to leave?

A. I did, sir.

Q. And you asked them all to break it up?

A. That's true.

Q. But in spite of that fact there was other people, freedom riders off the same bus, who was peacefully eating in the cafeteria facility of the Greyhound Bus Station in Ocala, is that right?

A. I had seen them enter the cafeteria and then after this I seen them sitting at a table inside, yes, sir.

Q. They were not molested by you or any other law enforcement officer, is that right?

A. None of them was talked to at all at the bus station, no, sir.

Q. Is your opinion such that the defendant here was deliberately or trying to cause some disturbance at the bus station in Ocala?

BY MR. JACKSON: Objection, your Honor. I think he can testify as to what the defendant did, but whether it's his opinion he was trying to cause some disturbance is left for this jury panel to determine upon the evidence submitted to them.

BY THE COURT: There is no qualification, Mr. Musleh, for the witness---

Q. **BY MR. MUSLEH:** You did give the defendant here at least 6 opportunities to return to the bus upon which he came, is that correct, before you placed him under arrest?

A. That's correct.

Q. The white people were dispersed and I believe you stated one of them even with a little help from the police department or from your sheriff's office?

A. Yes, sir.

BY MR. MUSLEH: That's all, Mr. Geiger.

RECROSS EXAMINATION

Q. **BY MR. JACKSON:** Mr. Geiger, when you walked up, you said, to the group at the door, did you tell this defendant that he could go on and eat in the cafeteria?

A. When I first walked up to them, as I say there was an altercation or skirmish or whatever you might call it, and at that time my concern was getting them outside away from the people.

Q. I understand. Now, when they told you they wanted to go eat, did you say all right, go on and eat?

A. That was later outside after I had ordered them back on the bus. I told them that they could not eat in Ocala. They would have to eat someplace else. They couldn't eat in the bus station.

Q. Well, now, you said that as a matter of fact when you walked up to this group where you saw the skirmish at, you told those people to go outside?

A. That's true.

Q. You didn't let anyone progress or walk further into the bus terminal, isn't that true?

A. None of that group, no.

Q. None of that group, and this defendant was one of that particular group?

A. He was.

Q. So you didn't let him walk into the cafeteria, did you?

A. Not after I had approached, no.

Q. I see. That's when you first walked up to them?

A. That's right. The law is applicable to all of them.

Q. So if he wanted to go into the cafeteria, he could not go because you told him to go outside, isn't that true?

A. After the trouble had started, that's true. None of them could go on inside.

Q. How did you identify yourself, Officer Geiger?

A. I advised them who I was. At that time the sheriff was there to convince Owens who I was. He's the one I had the trouble with as far as identification. He did not know me, there was anger involved. He demanded to know who I was and the sheriff told him who I was. After that, they were all convinced of the fact that I was a law enforcement officer and deputy sheriff.

Q. Did the sheriff tell this defendant who you were?

A. All of them were within---

Q. Did you make any identification to them?

A. None of them asked for any identification. I didn't show them any.

Q. You didn't show them anything?

A. I work in civilian clothes altogether.

Q. In other words, you were dressed in civilian clothes.

A. That's right.

Q. You didn't show them your badge?

A. I had my badge and my identification folder in my pocket. None of them asked for it. The fact was only questioned by Owens and Sheriff Willis advised Owens to his satisfaction.

BY MR. JACKSON: That's all.

REDIRECT EXAMINATION

Q. BY MR. MUSLEH: Was the defendant, Lesley Lee Smith, attempting to use any facility in the Greyhound Bus Station in an orderly non-violent manner when this skirmish occurred?

A. Not to my knowledge.

BY MR. MUSLEH: That's all.

RECROSS EXAMINATION

Q. BY MR. JACKSON: What did he do that was non-violent?

A. I assume when he came through the door that he wasn't doing anything that was violent. Therefore, it would have been non-violent the fact that he walked through the door. That was non-violent.

Q. Well, what did he do that changed your mind that was non-violent?

A. Would you repeat that, please?

Q. What did he do that changed your mind that he was acting in a non-violent manner?

A. Well, what changed my mind was the fact that he was acting in a violent manner was the fact of the argument between the 6 persons gathered inside the door. Up until that time, so far as I know, everything he did was non-violent.

Q. You said that you didn't see him touching anybody or struggling with anybody or anything. You say you didn't see him, is that right?

A. If you'll recall I was approximately 15 or 20 feet from the scene. When I arrived the only arms I seen that was anyplace they possibly shouldn't have been was Owens and O'Connor. After I arrived and asked what the trouble was, Owens informed me that the defendant here had stepped on his foot and he wanted an apology. I did not see that.

Q. I'm saying what did he do that was violent?

A. I didn't say that he did anything that was violent.

Q. Then if he didn't do anything that was violent, then he was attempting to use it in a non-violent manner, wasn't he?

A. He was in a group where there was violence of which he was a part of. He let me know he was a part of that. He was standing shoulder to shoulder with O'Connor whom there was trouble with and with Callendar.

Q. Well, I mean you say he was standing shoulder to shoulder, was he fighting?

A. No, he wasn't fighting.

Q. Was he assisting O'Connor?

A. Verbally. That's the only way anyone assisted after I got there was with words.

Q. Well, I mean did you see him do anything physically, violent?

A. No, no one did after I arrived there because that was my purpose of going, to stop it from happening.

BY MR. JACKSON: That's all, thank you.

REDIRECT EXAMINATION

Q. BY MR. MUSLEH: Mr. Geiger, did you have a coat on that day?

A. Yes, sir.

Q. And you as chief deputy your uniform is usually civilian clothes, is that right?

A. That's true, sir.

Q. Were there any other officers there in uniform at the bus station?

A. I couldn't say, Mr. Musleh, at that time.

BY MR. MUSLEH: All right, you may step down. Tell the sheriff to come in, please.

SHERIFF DOUGLAS WILLIS, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. BY MR. MUSLEH: Will you please state your name?

A. Doug Willis.

Q. You're the sheriff of Marion County, Florida?

A. That's correct.

Q. Mr. Willis, how long have you been sheriff of Marion County?

A. Since January 3rd.

Q. Of 1961?

A. This year, 1961.

Q. Mr. Willis, how much law enforcement experience have you had prior to being sheriff of Marion County?

A. Approximately 30 years.

Q. Approximately 30 years, and that has been the last continuous 30 years?

A. No, sir, almost 24 years continuous.

Q. What were your duties prior to becoming sheriff in Marion County, Florida?

A. I was a deputy sheriff, chief deputy.

Q. Prior to that time, had you had any experience with the Highway Patrol?

A. Yes, sir, I had 9 years with the Highway Patrol.

Q. And you were sheriff on the 16th of June, 1961, is that correct?

A. I was.

Q. Were you in the Greyhound Bus Station in Ocala, Florida, on or around noon of that day?

A. I was.

Q. Did you see the defendant, Lesley Lee Smith, at the Greyhound Bus Station on that date?

A. I did.

Q. Mr. Sheriff, approximately what time did you arrive at the Greyhound Bus Station?

A. It was in the vicinity of 12:00 o'clock. I don't remember the exact time.

Q. Did you have any information that some freedom riders would come through the bus station?

A. I had.

Q. You are the chief law enforcement officer of Marion County, are you not?

A. Yes, sir.

Q. Did you assign any of your deputies down there at all during the day?

A. I did.

Q. And for what purpose did you assign your deputies there?

A. To try to prevent trouble.

Q. Now, would you state to the jury now under what circumstances and conditions did you see the defendant at the bus station around noon? Will you tell the jury now?

A. When I first saw him he was just inside the door in the waitingroom in somewhat of a scuffle among some other people, another colored fellow and several white people, and I stepped inside of the door while Mr. Geiger was my chief deputy was inside trying to disperse the bunch, trying to get them to leave the waitingroom.

Q. To disperse whom?

A. Trying to get everybody to disperse, break up the congregation.

Q. Everybody there at that time that was scuffling?

A. Yes, sir.

Q. All right, go ahead.

A. So I partly held the door while they came outside of the waitingroom and I heard Mr. Geiger tell the white people as well as the colored to leave the premises. The white fellows immediately left, other than one white fellow that was with the colored, and they refused to leave.

Q. Who refused to leave?

A. The defendant and two others.

Q. All right.

A. They were asked by Mr. Geiger to leave the premises or get back on the bus. There seemed to be some indication of violence. He wanted to prevent trouble and he asked them to get on the bus, and they refused to do so.

Q. How many times did you hear Mr. Geiger ask this defendant to get back on the bus because of this trouble?

A. I'd say 3 or 4 times.

Q. That you heard in person yourself?

A. Yes, sir.

Q. Did you as chief law enforcement officer of Marion County order this defendant to get on the bus because of the possibility of violence?

A. I did.

Q. Would you tell the jury what you said and under what circumstances did you order him to leave?

A. I first told them that I was the Sheriff of Marion County, and I wished that they would get on the bus or leave the premises, and they advised me--the defendant and the others--that they were riding the bus, they were hungry, and they were going to eat. So they were told by Mr. Geiger that unless they did get on the bus or leave the premises he'd have to place them under arrest. That seemed to have no effect on them whatever. They still insisted they were going to eat. That was when I told them---I was a little ahead of my story. That was when I told them I was the sheriff and they could either leave the premises or we'd have to place them under arrest. They refused to go so I placed them under arrest myself.

Q. Mr. Willis, did you see the initial skirmish which this defendant or any others of his group was involved in?

A. I saw some movement inside but I didn't see it well enough to see what actually took place. I was outside the door and the skirmish was taking place on the inside.

Q. Did you see the defendant here being restrained by any group, either independent white people or by officers, from using any of the facilities of the Greyhound Bus Station in Ocala, Florida?

A. No sir.

Q. Up until the time that Officer Geiger and yourself informed the defendants to disperse, did the defendant request the use of any facility up until that time?

A. No, sir.

Q. It was only after the order was given by Mr. Geiger that the defendant decided they wanted to use the cafeteria and requested it, is that right?

A. That's correct.

Q. Did you---At what point was the defendant actually in the bus station when you first observed him? Approximately how many feet from the door?

A. I'd say he was 8 to 10 feet inside the door.

Q. Would that be referring now to the west door?

A. Yes, sir.

Q. The cafeteria is to the east of that, is that correct?

A. It is.

Q. In what direction was the defendant facing at the time that you saw him?

A. At the time I first saw him?

Q. Yes.

A. He was coming towards the door.

Q. He was walking in a westerly direction where the cafeteria was in an easterly direction?

A. Yes, sir.

Q. Sheriff, in your somewhat 30 years of law enforcement, have you had the occasion to observe acts of small groups or large groups which eventually led to disorder or riots?

A. I have.

Q. Sheriff, in your 30 years of law enforcement experience and based upon all---I suspect you've been in all branches of law enforcement?

A. I worked with city, county, state, and finally wound up as sheriff.

Q. Did you feel or did you have any apprehension or fear that unless this group was dispersed that this assembly of 6 that there would result in possible violence?

A. I thought so, yes, sir.

Q. And was it based upon your thought and your apprehension and fear that you ordered the defendant back on the bus, and the 3 white people to remove themselves from the premises?

A. That's correct.

BY MR. MUSLEH: That's all.

CROSS EXAMINATION

Q. **BY MR. JACKSON:** Mr. Willis---Sheriff Willis, I should say, did you see the defendant when he went into the bus terminal?

A. No, sir, I did not.

Q. In other words, when you first saw the defendant, Mr. Geiger had already approached them at the scene, isn't that true?

A. Yes, sir.

Q. When you told the jury that you saw him walking back to the door, wasn't that in connection with Mr. Geiger's demand that they move outside of the building?

A. He was forcing them out, yes, sir.

Q. So you weren't telling the jury here that you never saw the defendant going towards the cafeteria?

A. No, sir, I didn't see him going in the cafeteria.

Q. In other words, when you saw him Mr. Geiger had appeared on the scene and was forcing them back out of the door?

A. That's right, him with the other group.

Q. Whether or not he wanted to go to the cafeteria or not, you don't know, do you?

A. I didn't hear him mention it until after he was on the outside of the building.

Q. Now, you said that he didn't mention it to Mr. Geiger before. Isn't it true that Mr. Geiger was at the scene before you?

A. We drove down to the bus station at the same time. He was inside the building before me.

Q. What I mean, Sheriff, is this, that when you saw the defendant here Mr. Geiger had already gotten in contact with him, isn't that true?

A. That's correct.

Q. You don't know what was said between Mr. Geiger and this defendant, do you?

A. I do not.

Q. Because you were outside the building, so when you tell the court here, the jury, that he didn't say he wanted to go to the restaurant before he was told to get on the bus, that would be a conclusion on your part.

A. I didn't say that I heard him say anything to Geiger on the inside of the building.

Q. So you're not denying that he did say that ?

A. No, I don't know whether he did or not.

Q. Now, How were you dressed, Sheriff?

A. I was dressed in plain clothes. I go in plain clothes all the time.

Q. What did you do to identify yourself to this defendant?

A. I told them I was the sheriff, I had a small badge on the lapel of my coat, I had Sheriff on a badge on my tie that's easily seen.

Q. Is this the little badge, this tie clasp, sir?

A. That's right, and I had a badge on the front of my coat, too.

Q. That was one of the little pin size badges, lapel badges?

A. That's correct.

Q. You didn't have on a regular size sheriff's badge?

A. No, I don't wear one.

Q. That was all you had in the form of identification?

A. That's right. They didn't question my authority. I had a badge of this type in my pocket. Should they ask for further identification, I had this I carry.

Q. But you didn't show that to them?

A. I did not. They didn't ask for it, and I didn't show it to them.

Q. Now, Sheriff, did you ever tell them they lcould go and use the restaurant facilities if they desired to do so?

A. I did not, no, sir.

Q. They told you they were hungry and they wanted to use the cafeteria?

A. That's right.

Q. But you still told them to get on the bus?

A. That's right.

Q. Now, Sheriff, you have, no doubt, in your 20 years or 30 years?

A. Yes, sir, approximately 30 years.

Q. Sheriff, you have, no doubt, arrested men that were involved, say, in fracas or a fight, is that right?

A. Yes, many times.

Q. And you have told one group to go this way and another group to go the other way?

A. That's right.

Q. Isn't it true that you could have on that same day told the men that were--these 3 white gentlemen--couldn't you have told them to leave the bus terminal if you don't have any business in connection with the travel of the bus? Couldn't you have told them that?

A. I had no concern as to who was traveling on the bus as far as I was concerned.

Q. You didn't ask them whether they were?

A. I didn't. I didn't care where they were going. It didn't make any difference to me.

Q. Did you hear this defendant use any form of profanity or anything of that sort?

A. No, I did not.

Q. Did you see him at any time assisting to fight and struggle with someone?

A. No, I didn't.

Q. Now, you said you had some trouble with Mr. Owens?

A. Mr. Owens?

Q. Mr. Owens. Is that right?

A. I asked him to leave the premises, yes, sir.

Q. Was he cursing?

A. I didn't hear him cursing any, no.

Q. And he left the premises?

A. He did.

Q. And at the time you put these defendants under arrest, you say, was after these other 3 had left the premises, is that right?

A. Mr. Owens and the others had left the premises, yes. One came back and I had to tell him the second time to go, but he stayed away the second time.

Q. Sheriff, you said that at the time these--this defendant was there that there were two other or more colored persons in the lunch counter or in the cafeteria eating, is that right?

A. I didn't say that, no.

Q. You didn't see any of them?

A. I did not.

Q. **BY MR. JACKSON:** That's all.

BY MR. MUSLEH: You may step down, Sheriff.

JOHN H. OWENS, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. **BY MR. MUSLEH:** State your name, please.

A. John Owens.

Q. Your address, please?

A. Route 4, Box 521, Ocala, Florida

Q. On or about the 16th day of June, 1961, around 12:00 noon or shortly thereafter, were you at the Greyhound Bus Station in Ocala, Marion County, Florida?

A. The exact date I don't remember, but I was there somewhere around that.

Q. Were you there on the date of the incident involving you and the defendant sitting at the table?

A. Yes.

Q. Did the defendant come in physical contact with you at the bus station in any manner?

A. Yes, he stepped on my foot as he came into the door.

Q. Which door of the bus station did he come into?

A. The west waitingroom door.

Q. Now, as a result of this stepping on your toe, was there any incident which occurred right shortly thereafter or at that time?

A. Yes, I was angry a little bit and started to shove him outside. I believe I asked him to go outside.

Q. Did Chief Deputy H. A. Geiger at that time come upon the scene?

A. Yes, right then or within a few seconds afterward.

Q. What did Chief Geiger ask you, among the others involved---was the others involved in this little tussling business other than you and the defendant here, Smith?

A. Yes, sir, there was one fellow slinging his arms around there and talking. I believe his name was O'Connor.

Q. Was he one of these so-called freedom riders?

A. Well, I found out later, yes, sir, that he was.

Q. All right, was there anyone else other than you there from Ocala that was involved right in this incident here that you're testifying to, this tussle?

A. No, sir, not involved. There was others there.

Q. What did Mr. Geiger tell you and the others to do as soon as he arrived on the scene?

A. To get off of the property, get out of the way and go on home.

Q. Did he order you to do that?

A. Yes, sir.

Q. Did he order the defendant to do that in your presence?

A. He ordered the defendant to get on the bus.

Q. What did you do when you were ordered by Mr. Geiger to leave the premises?

A. I left.

Q. You did not return then?

A. No, sir, not to the bus station.

BY MR. MUSLEH: You may inquire.

CROSS EXAMINATION

Q. BY MR. JACKSON: Mr. Owens, I understand you said that you were at the bus terminal on the date---I think it was on the 16th of May, 1961, when this incident occurred, is that right?

A. I think that was June instead of May, wasn't it, somewhere in June?

Q. Well, in June.

A. Yes.

Q. Now, what were you doing on the premises of the bus terminal?

BY MR. MUSLEH: To which the State objects, first, it was not brought out at all on direct examination. His purpose at the bus terminal is immaterial and irrelevant. If he cares to make this witness his witness, your Honor, then he can inquire into it. It's improper cross examination as to why he was at the bus station. Nothing was brought out on direct even touching that point.

BY MR. JACKSON: Your Honor, the State cannot put a witness on the stand and ask him chosen questions and then object to him being cross examined fully in connection with the matter as the State's witness. I think when he takes the stand to testify to an incident that he can testify fully to the incident and his presence on the property of the bus station is a relevant question.

BY MR. MUSLEH: His presence is not relative as, certainly, counsel don't contend that it's unlawful for counsel or me or your Honor to have been on the bus station, at the bus station on June 16th, 1961, and, therefore, he has the perfect right, should he desire to make this witness his witness, to inquire into the reason for being at the bus station. Certainly, I don't think that he's implying that it's unlawful to have been at the bus station.

BY MR. JACKSON: I did inquire as to what was his business there.

BY MR. MUSLEH: Your Honor, that's immaterial and irrelevant and it's not proper cross examination.

BY THE COURT: I think the court can take judicial notice that the bus terminal is a public place and, therefore, sustain the objection.

Q. **BY MR. JACKSON:** Mr. Owens, had you----Were you in the process of traveling on the bus at the time you were in the bus station?

BY MR. MUSLEH: Same objection, your Honor. Counsel is trying to obtain indirectly what the court sustained he could not obtain directly.

BY MR. JACKSON: What's the difference in that? I'm not asking what he was doing.

BY MR. MUSLEH: Same objections, your Honor, to the question. This is the same question, only phrased in another manner.

BY THE COURT: Your question was that he was using the traveling?

BY MR. JACKSON: Was he using the bus at the time that he was on the premises of the bus terminal?

BY THE COURT: Could you probably clarify that?

BY MR. JACKSON: I mean was he a passenger on a bus, you Honor.

BY MR. MUSLEH: I object to that, your Honor, on the same grounds. He's just trying to obtain indirectly what he couldn't obtain directly. It's immaterial whether he was a passenger or not. He has a lawful right and I don't think that any group or organization is confined as to being the sole passengers of the bus station regardless of who pays the fare. He has a lawful right to be there. If counsel for the defendant wants to make him his witness to inquire into that, he can. There was nothing brought out on direct examination other, your Honor, than the series of events and what happened between the defendant and the witness. Now, he's going far beyong the field. He has the right to call him back as his witness. He knows the rules of procedure.

BY MR. JACKSON: I know them very well, your Honor, and I understand and I know the law to be that the State cannot bring a witness to the stand as a State witness, ask him the selected questions that they desire and then cover up and run and say he's not my witness any more, that when they place a witness upon the stand to testify relative to any incident, and this is a part of the incident, that the witness can be cross examined fully to the incident. The fact that he didn't ask him that question does not limit me where I cannot ask him that particular question. If that were the rules, then all I could do is paraphrase every question that the State would put to the witness. If that was the rule of law governing cross examination, then I want to see it some place.

BY MR. MUSLEH: You ought to look a little bit. Now, your Honor please, the fact that he was a passenger on the bus is immaterial and irrelevant. The Court must take judicial notice that he, you, I, or anyone else could have been a passenger on the bus and how does that affect the materiality of what occurred, whether he was a passenger, and I think the Court can take judicial notice that the bus station provides other facilities other than travel, such as restroom, buying magazines, eating, etc., so it's immaterial. It's not proper cross examination and, certainly, counsel knows that should this information be material, if he asserts to his defense, that he has the opportunity to call and to make Mr. Owens his witness.

BY THE COURT: The Court is going to sustain the objection.

Q. BY MR. JACKSON: Mr. Owens, would you be kind enough to draw the bus terminal entrance and draw where you were when the defendant stepped on your foot?

BY MR. MUSLEH: Again the State objects, your Honor, please. I don't know whether or not---

BY MR. JACKSON: You're going to object to everything, aren't you?

BY MR. MUSLEH: I object to you being here.

BY MR. JACKSON: I know that. Me, too.

BY MR. MUSLEH: Your Honor, please, I do not know any precedent at all on cross examination, and I would certainly like for the jury to be excused where counsel can offer any, where the attorney on cross examination can hand the witness a piece of paper and say draw something on a piece of paper. That is not testimony before a jury or an exhibit before a jury or even proper cross examination. Now, he can ask him where his relative position was in the bus station in reference to the relative position of the defendant. But, now, your Honor, he has gone far afield, and I know of no precedent for handing the witness a piece of paper and saying here, draw it. This is being excluded from the jury, to start off with. First, I suspect you must establish some ability on the witness's part that he can even write, much less draw.

BY THE COURT: Overrule the objection. You can go ahead and draw the location as best you can.

BY MR. JACKSON: Your Honor, I'd like counsel to back up so that the witness can draw this particular item freely. I mean I'm standing back.

BY MR. MUSLEH: You're looking at it.

BY THE COURT: Refrain from arguing, gentlemen.

BY MR. MUSLEH: All right.

REPORTER: (Witness drawing same.)

Q. **BY MR. JACKSON:** Now, Mr. Owens, in order that we may understand this drawing, you've drawn an oval shape object here with two vertical walls, is that correct?

A. Well, something similar, but that should be the parking lot.

Q. In other words, this top portion here is the parking lot?

A. Yes.

Q. Can you write parking lot in there?

A. Yes, sir.

Q. Write parking lot in there for me, please. Now, Mr. Owens, you have 2 or 3 marks here. Is this supposed to be the door?

A. Yes.

Q. Would you mind writing door here and having an arrow point to the entrance there. All right. Now, will you tell--- you have two circles, and are these circles supposed to be you and some other person?

A. Yes.

Q. Which one is you? Will you draw a little line away from it and write whether it's you or whether it's the defendant? You may use the word defendant. It's quite all right.

A. Here.

Q. And would you draw just a little line this way and put D there for the defendant. This is the D here, isn't it?

A. Yes.

Q. Now, these doors swing open--I mean, they open by swinging back and forward?

A. I believe they do. I don't remember just how they do.

Q. Had the door closed when the defendant stepped on your foot?

A. It was closed or in the act of closing. I wouldn't say right there because he come right in.

Q. In other words, you were attempting to walk out at the same time he was walking in?

A. Something like that.

Q. Is that right?

A. In other words, we met. That's the first time I ever saw him.

Q. But what I'm saying is, did you all collide there?

A. Yes. He stepped on my foot as I was coming out and he was coming in.

Q. What other part of his body touched your body?

A. Well, I don't believe there was any unless as I wrenched my knee. It could have struck him or he could have struck me that way. I wouldn't say exactly because, naturally, I tried to get my foot out of the way.

Q. Now, were any other persons standing around you at the time?

A. Not that I know of. Of course, there was others there, I know, but in particular I couldn't say.

Q. Now, would you sign your name to that, please, sir, just to the bottom of it.

REPORTER: (Witness signing same.)

BY MR. JACKSON: Your Honor, we'd like to introduce this as a defendant's exhibit for identification only.

BY MR. MUSLEH: I object to it--having it marked, your Honor please,---(Reporter: several words would not be understood) ----let the State note its objections.

BY THE COURT: Mark it as defendant's exhibit #1.

Q **BY MR. JACKSON**: Now, Mr. Owens, you said that the defendant here stepped on your foot. Did you grab hold of him?

A. No, I shoved at him a little bit, naturally, as I come out, but I don't believe I touched him.

Q. Did he shove back at you?

A. No, I was waiting for him to apologize.

Q. Well, was there any scuffling between you two?

A. No.

Q. Beg pardon?

A. No, not to say scuffling.

Q. Well, I mean I understood you to say what happened was that the defendant walked in the door and stepped on your foot and you shoved him off your foot?

A. Well, I probably shoved him, but as scuffling goes there wasn't any.

Q. In other words, he didn't turn around and grab you or anything, and you didn't turn around and grab him?

A. No.

Q. And you never grabbed him and he never grabbed you?

A. No, I might have put my hands on him. I don't remember. In other words, pushed back something like that. I don't remember exactly, it happened so quick.

Q. Well, what I'm trying to say, Mr. Owens, it was just this one situation. It was probably all in one motion. In other words, if he stepped on your foot, you probably snatched your foot back and probably pushed him--I understand what you're saying - and that was the only physical contact between you and this defendant. Is that what you're telling this court?

A. I believe it was.

Q. Now, did he argue with you about it or say anything to you about it?

A. No, he didn't open his mouth.

Q. Now, did you start fighting with someone else?

A. No.

Q. Beg pardon?

A. No.

Q. You said that there was another fellow that was swinging his arms around. Mr. Owens, kind of show the jury what you're talking about.

A. Well, I don't remember just how it was, but he was making motions all around and saying something about the lunch room, lunch room, lunch room.

Q. Oh, I see. In other words, he wasn't striking at you?

A. No, he wasn't actually striking at me, but then I could have taken it that way, a stranger, but, of course, I ignored it at the time being.

__BY THE COURT:__ Excuse me a moment. The Court is going to clear the courtroom if there's any other outbursts. All right, you may proceed.

Q. __BY MR. JACKSON:__ Now, Mr. Owens, in other words, what I'm getting down to when you said he was swinging his arms, you aren't telling the jury that he was swinging at you, you know, are you?

A. Well, I wouldn't say that he was, actually, swinging at me. He could have been protecting someone or wanting to, or he could have thought I was angry at someone else and might have struck him, and he might have been trying to protect him. Now, I wouldn't say that he was actually swinging at me because----

Q. And you didn't swing at him?

A. No.

Q. What happened immediately after that? Is that the time Officer Geiger came up at that moment?

A. Shortly, but he was there right shortly about the time of some of the swinging, or when I was talking to the defendant.

Q. You were talking to the defendant?

A. Yes, I talked to him some.

Q. But he wasn't saying anything back to you?

A. No.

Q. Now, Mr. Owens, were you at any time during this particular situation tied up, you know, physically with someone, wrestling with them?

A. No, not physically wrestling with him.

Q. Now, did anyone put their hands on you or grab you?

A. Yes, there was someone put their hands on me, I don't know who it was.

Q. You don't know who it was?

A. No.

Q. You didn't see the defendant put his hands on you?

A. No, he didn't put his hands on me that I know of.

Q. Now, were there two other local residents of Ocala at the scene when this happened?

A. Well, there was two there right after it happened or while it was happening, I don't remember just which. In other words, I was at the door and I don't know who was direct behind me.

Q. I see. In other words, when this happened did you stop or did you continue walking? Did you stop and face the defendant or did he stop, turn and face you?

A. He was already facing me.

Q. In other words, he was still headed into the cafeteria?

A. No.

Q. I mean into the waitingroom?

A. Yes.

Q. He could go from there into the cafeteria, could he not?

A. Yes. There's an opening there.

Q. Now, when Officer Geiger came up, what were you saying and what were you doing, sir?

A. Well, at the time I was talking to him. I disremember all that I said or, the facts are, anything I said exactly.

Q. Well, summarily kind of give the jury---they were not there and the court was not there, I was not there and, of course, we want very much to hear what you have to say about what happened.

A. Well, I was expecting him to apologize for stepping on my foot and it seems like I could have been saying something to him, but the exact words I don't know, but then I probably did, and this other fellow kept grabbing at him and telling him the lunch room was in here. Well, he seemed to be---he was running around, seemed to be, in circles that a way and, naturally, I was walking on towards him and he was backing towards the door, seemed to be a little bit or backed up, and some of the rest of them spoke up and seemed to think we would have a little argument. Now, of course, that's all I know.

Q. Of course, it had not developed into such an argument, had it?

A. Not any actual argument, although I was a little angry.

Q. You were not swearing at him and he was saying nothing to you. Of course, you were saying you felt he should have said to you "I apologize".

A. Well, yes.

Q. And that was the situation when Officer Geiger came up and told all of you all to get out of the terminal, is that right?

A. Well, it seems like there was some more gathered around. Now, of course, I didn't pay any attention to who, but there was beginning a crowd to accumulate.

Q. Well, I mean, other persons walked up to the scene, is that right?

A. Yes.

Q. They were not fighting or engaged in the struggle at all themselves, were they?

A. Well, no, not that I seen, because there was some more folks all around, moving about, so that question is something I couldn't say exactly.

Q. You were there and you didn't see anyone tied up or fighting with themselves. You know that you were not?

A. No, there wasn't that I could see, but there could have been. Of course, now, I didn't see it.

Q. You didn't hear them cursing or doing anything of that sort?

A. No.

BY MR. JACKSON: That's all.

REDIRECT EXAMINATION

Q. BY MR. MUSLEH: Mr. Owens, let's get to the gist of what happened down there now. Were you at the bus station by yourself?

A. Yes.

Q. You were walking out the west door, is that correct?

A. Yes.

Q. This defendant you claim stepped on your toes, is that correct?

A. Yes.

Q. Was he by himself?

A. Well, as far as I saw with the exception of---I believe it was O'Connor or someone else, I don't remember his name to be exact---got a hold of hold of his arm after he stepped on my foot.

Q. O'Connor grabbed the defendant's arm?

A. Yes, and pulled him towards me. In other words, he gave a little pull and said the lunch room is this way, and then I realized there was more than one there.

Q. What did you do when he pulled him towards you?

A. Well, I stood there in the way and blocked the way and was expecting him to apologize.

Q. You stood in front of the defendant here?

A. Yes.

Q. Other people then gathered around?

A. Yes.

Q. Did O'Connor move his arms in any manner as if to shove anyone?

A. Well, he could have been shoving at me, but----

Q. Was he moving his arms to anyone?

A. Yes.

Q. Was there any shoving going on?

A. Well, yes, there was some shoving or pulling, one or the other. It could have been pulling or shoving at me or the other fellow.

Q. Now, did other people gather around then?

A. Yes, there was others gathered.

Q. Was there any angry words said by anyone, whether you know who they are or not, in that group?

A. Well, the best I can remember, some of them did say some little something about making him apologize, or something that a way.

Q. It was on the verge then or there had been angry words and there was shoving at the time that he went into the room?

BY MR. JACKSON: Your Honor, I object to the State has called this witness as his witness. The State does not have the right to cross examine this witness, nor to impeach this witness. This witness has testified relative to the matters of what happened and I object, your Honor, to the line of questions that have been propounded to this witness and ask, your Honor, that they be stricken from the record and the answers given thereto stricken as being improper questions to a State witness called by the State for examination.

BY MR.MUSLEH: If the State can't examine its own witnesses, I don't know who we can examine.

BY MR. JACKSON: NOT Cross examine them on the questions.

BY THE COURT: The court is going to overrule the objections. You might refrain from leading the witness.

Q. **BY MR. MUSLEH:** Well, now, there was angry words, is that your testimony?

A. Well, there was some of them making angry words behind.

Q. And you testified as to some shoving there?

A. Well, there was a little shoving.

Q. And this was being conducted---these actions that you testified to were being carried on at the time Mr. Geiger arrived there?

A. Yes.

BY MR. MUSLEH: That's all.

RECROSS EXAMINATION

Q. **BY MR. JACKSON:** Mr. Owens, in order to get the record straight, I believe you testified that Mr. O'Connor actually was pulling on this defendant and telling him to come on to the---saying let's go eat or something, is that right?

A. Well, he was pulling on him and then he could have shoved me. I believe that he did, Mr. O'Connor did.

Q. Well, you said that he---you testified earlier that he did not?

A. Well, I think that he did.

Q. When did you start thinking that ?

A. Well, I just didn't bring it out a while ago.

BY MR. JACKSON: All right, thank you.

T. W. PENUEL, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. **BY MR. MUSLEH:** State your name.

A. T. W. Penuel.

Q. Where do you live at, please?

A. About 6 miles west of town, on road 40.

Q. That's in Marion County, Florida

A. Yes, sir.

Q. On the 16th day of June, 1961, here in Ocala, Marion County, Florida, did you see this defendant sitting at the table here?

A. I don't think I saw him sitting at the table.

Q. I asked you if you saw the defendant and I identify him by the one sitting at the table. Did you see him in Ocala that day?

A. I wouldn't have known it if I had.

Q. All right, sir. Now, were you at the Greyhound Bus Station on or around noon of that date?

A. Yes, sir.

Q. Was there any altercation in which you and Mr. Owens were involved with some members or some people described as freedom riders?

A. Yes, sir. I walked in at the back door and I saw Mr. Owens and some fellow standing up there close together and they were saying something. I couldn't understand---

Q. Talk a little louder, please.

A. I said I come in at the back door. Me and Mr. Windsor had went up to meet his wife and I came in at the back door and I saw Mr. Owens standing up pretty close to some fellow--I don't know who he was--and they were passing some words and it looked like he had a hold of him.

Q. Who had a hold of whom?

A. Mr. Owens had a hold of some fellow or another, and there was a crowd gathered up around them when I got there.

Q. This crowd that gathered up around there, did you hear any angry or threatening words at all by this crowd?

A. No, sir.

Q. Did you get into this crowd?

A. I got on up inside the door and about that time the officers began to tell us all to get out. Well, I got out.

Q. When the officer told you to get out, you got out, is that right?

A. Yes, sir.

Q. Did you return?

A. I started back and he came to the door and told me to go on home, and I turned around and walked on off.

Q. After the officer told you to left, and you left, then you started back to the bus station?

A. I started back to see where Mr. Windsor was. I didn't see him anywhere and when the officer told me to leave again, why, I left.

Q. Did the officer tell everybody within that group to leave?

A. Yes, sir.

Q. Did everybody within that group to your knowledge leave?

A. There was some of that bunch that came in on the bus that didn't right at that time, but I don't know which ones it was.

Q. Well, the others that did not come in on the bus, did they all leave?

A. Yes, sir, as far as I knew, because I went on off.

BY MR. MUSLEH: That's all.

CROSS EXAMINATION

Q. **BY MR. JACKSON:** Was that Mr. Pender?

A. Penuel.

Q. Mr. Penuel, had you gathered in a mob, a group up there to fight anybody?

A. Huh?

Q. Had you gathered in this bus company to fight anybody?

A. No, that wasn't my intention. I just walked in there with Mr. Windsor---I mean to see if Mr. Windsor---he had gone in there to meet his wife and he and I went to town together.

Q. In other words, you weren't arguing with anybody or fussing with anybody?

A. No. When the officer told me to leave, I left.

Q. Now, you didn't--did you hear any---You said that you saw them talking. Did you actually understand the words they were saying?

A. No.

Q. You don't know what they were saying, do you?

A. No. I heard the officer tell them all to leave.

Q. And you left?

A. Yes.

BY MR. JACKSON: That's all.

J. A. WINDSOR, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. **BY MR. MUSLEH:** State your name.

A. Windsor.

Q. Mr. Windsor, where do you live at?

A. Martel.

Q. Is that in Marion County, Florida?

A. Yes, sir.

Q. On the 16th day of June, 1961, did you have occasion along with Mr. Penuel to go to the Greyhound Bus Station in Ocala, Florida?

A. Yes, sir.

Q. I ask you for what reason did you go there?

A. I was expecting my wife on the bus from Columbus, Georgia.

Q. Now, was that on or around noon of that date?

A. Well, I would say yes, sir, around between 11:00 and 12:00.

Q. Now, on that date did you see this defendant?

A. Yes, sir, I did.

Q. Under what circumstances----tell the jury what you saw and observed down at the bus station in which this defendant was involved.

A. Well, the best I know, me and Mr. Penuel had come in the bus station. These fellows had just come off the bus and when I looked up, him and Mr. Owens was standing talking. Exactly what happened, as far as I am concerned, he must have stepped on Mr. Owens' toe or foot or something, and they was talking.

Q. When you say talking, you put your hands out. Did they have their hands on each other?

A. Well, I wouldn't say they did but, you know, it was just quick. I wouldn't say they did, but they must have been.

Q. Now, what else did you observe then?

A. Well, just about that time, the sheriff department or police or somebody, I don't know exactly who the fellow was, it was all quick, you know. They started pushing us out and told us to get out.

Q. Was there more than 6 people involved in that group in the bus station that had gathered there?

A. Yes, there was more than 6 people, yes, sir. How many I wouldn't know.

Q. Did the group of people in the bus station gather around where Mr. Owens and the defendant each other were having these words and using their hands as you stated?

A. Yes, sir.

Q. Now, were there any angry words or anything that you heard at all during that group there?

A. Nothing more than I heard Mr. Owens tell him to get out on the outside. In other words, I would say he had asked him to apologize for stepping on his foot or something, but to be sure I wouldn't know.

Q. This crowd that had gathered around Mr. Owens, could you estimate for the benefit of the jury how many people were inside the bus station at that time?

A. I would say there was 10 or 12 people in there. It was about bus time.

Q. At that time when the officer came in, did he later identify himself as being Mr. Geiger, Chief Deputy?

A. He did because Mr. Owens, he asked---Mr. Owens asked who he was. In other words, he told him to get out and go, and Mr. Owens said well, who are you. I believe Mr. Doug Willis told him, he said that's my chief deputy, and he out with his billfold and showed him who he was.

Q. Now, did all the people inside the bus station leave when Mr. Geiger told them to leave, including yourself?

A. Well, I left and I don't know what become of the rest because when they told me to to I, naturally, went.

Q. When you were told to go, in spite of the fact that you were there waiting for your wife, you left?

A. I crossed the street to get off the bus station. He told me to get off of the bus lot.

Q. Did he tell you to get off the bus premises?

A. Yes, sir.

Q. And you left the premises of the bus and went across the street?

A. Yes, I went across the street over in front of Mack's Bar.

Q. Did you see other people leaving the bus station, too?

A. Yes, sir.

Q. And those other people which you saw leaving the bus station, did they go at the request and at the order of Mr. Geiger?

A. I imagine they did as I saw them all.

Q. Well, did they leave when Mr. Geiger said to leave?

A. Yes, sir.

BY MR. MUSLEH: You may inquire.

CROSS EXAMINATION

Q. **BY MR. JACKSON:** Mr. Windsor, you didn't see the defendant step on the foot of Mr. Owens, did you?

A. Not exactly.

Q. When you say not exactly, you didn't see him, did you?

A. They were right together.

Q. You saw them standing right up together?

A. Yes, but as far as looking at his foot on his foot, no, I didn't.

Q. You didn't see that, did you?

A. No.

Q. What you've testified here about the defendant stepping on his foot, that is merely what you suppose happened, is that right, or what you've been told?

A. No, not what I've been told, no.

Q. Did you suppose that at the outset?

A. Pardon?

Q. When did you come to the conclusion that he stepped on Mr. Owens' foot?

A. By what Owens told him.

Q. Oh, I see. What Owens told him.

A. Told him.

Q. What did he tell him?

A. He told him that don't step on my foot and not apologize for it.

Q. You heard that?

A. Yes, I heard that.

Q. What else did you hear?

A. About that time is when I heard the sheriff tell us to get out.

Q. Now, were you there to fight or do anything?

A. After a fight.

Q. Were you at the bus terminal----were you there to fight with anyone?

A. I was there to meet my wife.

Q. To meet your wife?

A. That's right.

Q. And you weren't threatening to fight anybody, were you?

A. I was not mad with anybody.

Q. Now, you heard someone step on someone's foot before, haven't you, and someone tell him, say apologize to him?

A. Sure.

Q. That's not the first time you've heard that?

A. I've heard it before.

Q. It didn't excite you when it happened, did it?

A. No, it shouldn't have. It wasn't my foot.

BY MR. JACKSON: I see. Thank you.

BY MR. MUSLEH: No more questions. The State rests.

BY THE COURT: The Court will declare a five minute recess.

(After recess, Court resumed at 5:05.)

BY MR. JACKSON: I'll wait until after the closing of the arguments to make my motion for a directed verdict.

BY MR. JACKSON: If it please the court, we'll have the defendant to take the stand.

LESLEY LEE SMITH, being duly called as a witness, testified as follows:

(**Reporter:** Witness stated he did not want to swear, but did affirm to tell the truth.)

DIRECT EXAMINATION

Q. **BY MR. JACKSON:** State your name, please.

A. My name is Reverend Lesley Smith.

Q. Reverend Smith, what is your business or profession?

A. I'm pastoring the Methodist Episcopal Church in Albany, New York.

Q. Did you have an occasion to be at the Ocala bus terminal on or about June 16th, 1961?

A. Yes, sir, I did.

Q. Will you tell how your arrival was begun and where it ended?

A. I purchased a Greyhound bus ticket from Washington, D.C., and traveled down towards--going---my destination was St. Petersburg.

Q. That was St. Petersburg, Florida?

A. Florida, yes.

Q. In other words, you purchased your ticket in Washington to travel from Washington, D.C., to St. Petersburg, Florida?

A. Washington to St. Petersburg. On the 16th I arrived at Ocala at about noon. Immediately after the bus stopped, the driver mentioned that this would be half an hour stop. You can be refreshed and be back on the bus because we are leaving within 30 minutes. After all the passengers exit from the bus, Mr. O'Connor, the professor of New York University, and myself go towards the waitingroom, and just as we pushed the door, we were blocked by one of the gentlemen that testified here.

Q. Was that Mr. Owens?

Q. Mr. Owens, the first one, and his hands were up like this and with the following words, if I may quote, "no niggers in this place", and then his hands were up this far and then I saw he was coming towards me and I keep on backing towards the door and, at that time, the sheriff came in.

Q. What did the sheriff do?

A. Well, there was---

Q. Did he tell you to go out?

A. He mentioned to us to go out and, at that time, I have an ulcer and supposed to have milk at noon and I mentioned to him this is a half an hour stop and I needed a glass of milk. In reply, he said "no, you won't be having nothing here", and he keep on pushing us out and then we went out in the sidewalk.

Q. Who was pushing, was it Mr.______--(Reporter: could not understand the name)--or was it the sheriff that was here?

A. Well, at first, I didn't know whether or not these gentlemen were sheriff or policemen. They were neatly dressed and they wore no uniform, and I didn't see no badge or any identification of any kind. If they mentioned to anyone that they were officers, I'm sorry but I didn't hear it.

Q. Now, you did explain to them that you wanted to go to the cafeteria, you say?

A. Yes, sir, most certainly I did. I mentioned that I have to get a glass of milk.

Q. Now, at the time the officers, these plainclothes individuals approached you, you've seen them here testifying here today?

A. Yes.

Q. They have identified themselves today as officers, is that correct?

A. Yes.

Q. At the time these two officers approached you, how many of you were at the door of the bus terminal?

A. Well, I'm not too sure, but I know Mr. O'Connor were there and at this time Mr. Callender joined us and two more gentlemen and the police officers. I don't know how many in all. I honestly couldn't say for sure how many were there, but there was not more than---approximately not more than 6 or 7 individuals there.

Q. In other words, you saw---Did a crowd later gather?

A. The crowd? There were no crowd as far as I could see because this thing happened so suddenly. Immediately after we reached out in the basement, the sidewalk, or outside the door, then the officer said "if you don't go back on the bus, you will be arrested" and then the word was repeated that we're interstate passengers and we're entitled to be served, and immediately he said, "now, you're under arrest", so if you should ask, I didn't have time to look around to see how many were there. We were just ushered into the car.

BY MR. JACKSON: That's all.

CROSS EXAMINATION

Q. **BY MR. MUSLEH:** You state your name and your profession as Reverend Lesley Smith, is that correct?

A. Yes.

Q. You are pastor of the Methodist Episcopal Church in Albany, New York?

A. Albany, New York.

Q. How long have you been pastor of the Methodist Episcopal Church in Albany, New York?

A. I've been pastoring in the Methodist Episcopal Church for approximately 8 years but the circuit in New York for just going 4 years now.

Q. You've been pastoring there approximately 8 years, is that right?

A. No, not in New York. I've been pastoring for 8 years.

Q. How long have you been a minister?

A. How long--

Q. Yes.

A. ---have I been a minister? Well, I was graduated in '54

Q. Where at?

A. Winnipeg College of Theology, Winnipeg, Canada.

Q. In 1954?

A. Yes.

Q. Are you a resident of or native of Canada?

A. No, I'm not. I was a student of Canada.

Q. Where were you born?

A. I was born in Jamaica, British West Indies.

Q. Are you a naturalized citizen of the United States?

A. My wife is a citizen of the United States.

Q. I asked you if you are a naturalized citizen of the United States.

A. No, I'm a British subject.

Q. Are you or have you ever been convicted of crimes before, Reverend Lesley Lee Smith?

A. Convicted of crimes?

Q. Convicted of crimes.

A. Is this relevant to this?

Q. Have you ever been convicted of crime before, Reverend Lesley Lee Smith?

A. What kind?

Q. All right, I'll ask you then. Are you the same Lesley Smith that was convicted in New York on 6/1/56 for soliciting a male?

A. No, I'm not.

Q. Are you the same Lesley Smith that was convicted and sentenced to 30 days in New York City in the City Magistrate's Court on 6/20 1956 for disorderly conduct?

A. I've never been arrested for disorderly conduct.

Q. Did you serve 30 days and were you sentenced to 30 days by the City Magistrate's Court in New York City on 6/20/1956?

A. There was an incident happened in New York. I was picked up there.

Q. And were you sentenced to 30 days in jail?

A. I was sentenced to 30 days.

Q. What charge were you sentenced on?

A. I don't remember the charge, but I was going to work. At the time I was a pastor and was going to work and I was picked up in the subway.

Q. On what charge were you sentenced?

A. I don't remember the charge, but I think it was loitering. I'm not sure.

Q. What was that?

A. Loitering.

Q. Well, now, let me ask you this. Are you the same Lesley Smith who was convicted in New York City and sentenced by the City Magistrate's Court, New York City, on November 6th of 1957 for loitering in a public toilet? Are you that same Lesley Smith?

A. No, I've never been convicted, sir.

Q. You have never---you were not convicted---let me repeat it again. I want to get it straight in the record. You're saying now that you were not convicted on November the 6th, 1957, in City Magistrate's Court, New York City, for violation of New York Statutes 1990A, to-wit: Loitering ina public toilet, and you were sentenced to a $10.00 fine and 5 days. Are you that same Lesley Smith? You're under oath.

A. I'm under oath, but the incident happened in New York.

Q. Were you---are you this same man? Were you convicted of this offense?

A. Yes, I was convicted of that offense.

Q. Are you the same Lesley Smith who was also convicted in the City Magistrate's Court in New York City on 8/15/58 for soliciting a male and sentenced to 10 days---$10.00 or 10 days fine and an additional 30 days fine, case #465157 of the New York Magistrate's Court?

A. When you said soliciting a male, what do you mean?

Q. That is the charge. I don't know. You were soliciting a male. You violated 1990 A-2 of the New York Code. Are you that man? Think before you answer. If you want me to repeat it, I'll repeat it. The testimony is being taken. I'll repeat it once again.

A. There was both two incidents in New York of which I was a victim---I was working at the Peter Cooper Hotel at the time going down in the subway and I stopped in the subway and then the officer taken me up for loitering or something. I was fined $5.00 and then I think it was the very same thing happens again at that time. I don't know how long after that it was.

Q. Well, let me ask you this. Are you the same Lesley Smith who was convicted at William Hart Island in New York and given a flat 30 day sentence and charged and pled guilty on 8/15/58 to soliciting a male, violation of 1990-A-2----

A. How many times----

Q. How many times have you been convicted? Let me ask you that. How many crimes have you been convicted of?

BY MR. JACKSON: Objection, your Honor. I know counsel knows that everything he's mentioned here is irrelevant and he knows that that is a misdemeanor and he knows that he has no right to ask this defendant any manner relevant to a misdemeanor, but only to a felony in the State of Florida.

BY MR. MUSLEH: I challenge that law in its entirety, your Honor. I've got the right to ask him of any crime that he's been convicted and I cite counsel for deliberately misstating the law. I'll ask you again. How many crimes have you been convicted of, Reverend Lesley Smith?

A. It was only two times that I have gone before the Magistrate away from this account.

Q. Is it your testimony under oath and in this record---

A. My testimony under oath---

Q. Let me get through with my question. Reverend Lesley Smith, is it your testimony that you have only been convicted of two offenses? Is that your testimony?

A. Yes, it was only two times that I've been convicted, two times that I know that I've been ---- I've been in this circumstances because of the trouble in my home and I didn't have no way to go, and I started to hitch a way here and there and that was the only two times.

Q. Let me ask you which of these two of the five offenses that I have named that you are saying now that you've been convicted of?

A. The only two that I have been convicted of----The first time that I---I think it was the evening I was going to the job and I was too early. I missed my train at Grand Central Station--I'm sorry. I was coming from Connecticut at night and I missed my train at Grand Central Station and I was there, and the officer came and picked me up there.

Q. Why did the officer pick you up there, Reverend Lesley Smith?

A. For loitering, he said.

Q. In a public toilet? Did you plead guilty to that offense of loitering in a public toilet on November the 6th of 1957, Reverend Lesley Smith?

A. Yes, I did.

Q. You plead guilty to that offense. Did you plead guilty and did you serve 30 days?

A. No, I did not. I paid $5.00.

Q. Did you ever serve 30 days?

A. On the second offense. I did not have any way to go and I was picked up for loitering when going to work and then I couldn't call and then I was put away.

Q. All right. You're saying now besides this loitering in a public toilet you paid a $10.00 fine or 5 days, but you also served a 30 day sentence, is that right, and what was the 30 day sentence that you were convicted of and served?

A. It was for the same, loitering.

Q. And did you serve 30 days? Did you serve 30 days in the stockade?

A. Yes, I did.

Q. And that's the only two you've been convicted of?

A. Yes.

Q. All right. Now let me ask you these questions. Are you the same Lesley Smith who was convicted on June 1, 1956, in the City Magistrate's Court of New York City, case #376334, of soliciting a male? Do you deny that charge?

A. Yes, I am not the same.

Q. You are not that man?

A. It was only on two occasions.

Q. You deny that you were arrested for soliciting a male as I said before?

BY MR. JACKSON: I think there's a difference in arrested or being convicted.

Q. BY MR. MUSLEH: I said convicted. Do you deny you were convicted of that offense?

A. It was only on two occasions that I have been in jail---

Q. Do you deny that you were convicted on June 1st, 1956, in the City Magistrate's Court in New York City, case #376334, of the offense of soliciting a male in violation of City Ordinance 722-8PL? Do you deny that offense?

A. I do not know what those numbers meant. It was only on two occasions, two times, that I've been in any kind of trouble at all on the same circumstances because of trouble in my home I didn't have no way to go and then I just keep on walking the street.

Q. You deny you were convicted of soliciting a male? Do you deny that?

BY MR. JACKSON: Your Honor, I think the witness has said he doesn't know.

BY MR. MUSLEH: Your Honor, I'll state that the grounds for filing perjury charges---

BY MR. JACKSON: Now, your Honor, just one moment. I've gone along with counsel a thousand and one ways to makestatements and question this witness. I have permitted him toexamine this witness for the benefit of the court and the jury. I have nothing to hide. Of course, I said that the witness has answered the question as best he can and that's all can be expected.

Q. BY THE COURT: Is there any better answer you can give to the question have you ever been arrested for that particular crime or not?

A. There is no better answer that I could possibly give. I know of these two incidents.

BY THE COURT: The only answer is yes or or no, of course, if you've ever been convicted of the offense. The answer you have given is I don't know.

A. I've been convicted of the offense, of the two things that he has mentioned.

Q. BY MR. MUSLEH: All right. Now, your Honor, two that you have not mentioned, I'll ask you this. Are you the same Lesley Smith who was convicted on June the 20th of 1956 in the City Magistrate's Court in New York City, case #465157, of disorderly conduct and you were sentenced and did serve 30 days in the stockade of New York City? Are you that man?

A. It was only two times, your Honor, that I've been in trouble.

BY MR. MUSLEH: I ask the court to instruct the witness to answer whether he was or not.

A. Well, how many times have you been---

Q. **BY MR. MUSLEH:** I ask you, are you this man, were you convicted?

A. No, sir. This is it. You've asked me these questions how many times.

Q. Can you read or write?

A. Yes, I can.

Q. You said you are a graduate of Winnipeg College, are you not?

A. Yes.

Q. I hand you an F.B.I. record and ask you to read that, the date of arrests, the convictions, and will you deny or admit that F.B.I. record that you are the same Lesley Smith in the convictions as set forth in that record. Would you read that? Are you the man?

A. As far as I can see, there are 4 convictions here.

Q. Do you deny them?

A. All that I can say that I was only in trouble twice, once I paid $5.00 and the other I----

Q. Go ahead. Will you read that record and say which of the two do you deny of being the same Lesley Smith? Would you read that, please?

BY MR. JACKSON: Your Honor, may I say this? The witness can say he doesn't recall. If he doesn't know he can't say that he knows, but if he does know, then he can tell the court that he does know.

Q. **BY MR. MUSLEH:** Let the witness answer that. Which of these two were you convicted of, which of the two that you're testifying to that you were not convicted of?

A. The only two that I can remember, the only two that I remember and the only two that I'm positive of are the ones that I paid $5.00 and---

Q. Let's start one at the time. The one that you paid $5.00, do you see any of the 4 convictions where you paid a $5.00 fine?

A. $10.00, I'm sorry.

Q. You paid $10.00. And did you serve 5 days?

A. No, I didn't serve 5 days. There was a suspended---It was $10.00 or a suspended sentence.

Q. This is the conviction now that you're testifying to in the City Magistrate's Court on November the 6th of 1957 for loitering in a public toilet, that you pled guilty of, is that right?

A. Yes.

Q. You were convicted of that. Which other crime on this F.B.I. record do you admit you were convicted of?

A. This one.

Q. The one you're referring now to is that the conviction of 8/15/58 in the City Magistrate's Court of New York City, case #465157----

A. I'm sorry, not '58. In '58 I was in Albany. Just a minute, I'm sorry. All that I can say it was only two that I really---

Q. Now, going along with you, you've named one. Which is the other conviction on this record that you admit?

A. It's only two that I can positively say----

Q. Which is the other one other than you've testified that you admit?

A. The one that I paid $10.00 and the one for 30 days.

Q. Now, this record here reveals that there were 2 or 3 30 day sentences. Which of the 3 30 day sentences do you admit to?

A. The one that I admit is the one I paid $10.00 and 30 days.

Q. You admit then the one here which is dated 8/15/58, follow me if you will, Reverend, in the City Magistrate's Court, New York City, #465157, violation of 1990-A-2, loitering ina public toilet. You were sentenced to $10.00 or 10 days and a 30 days. Is that the one you admit to?

A. That's the one I admit to.

Q. All right. Now, do you now deny the conviction here of June 20th, 1956 , of being convicted in the City Magistrate's Court, New York City, of disorderly conduct and you were sentenced to 30 days flat time. Do you deny that?

A. 1956?

Q. Right here, 1956.

A. 1956 in New York for disorderly conduct---Yes, I do.

Q. You deny that ?

A. I deny that.

Q. Do you deny that you were convicted for any offense in New York City on the 20th day of June in 1956 at all? Do you deny you were convicted of any offense on that date?

A. On that date, yes. This is the only twice--two times I have ever been convicted.

Q. You deny being convicted on June 20th, 1956. There is no doubt in your mind about my question, is there? Do you understand my question well enough, do you not?

A. Very well.

Q. Would you repeat to me what you're testifying to?

A. You asked me if I denied the report her for 6/20/56.

Q. And you deny that conviction?

A. I deny that conviction.

Q. Now, let's look at this conviction here which I'm referring to on 8/15/58 in W.H.--that's the initials--Hart Island. Are you acquainted with that place?

A. No, I've never been there.

Q. You don't know that place?

A. I've never been there.

Q. In New York, New York, of Lesley Smith, case #502698, which you were convicted of the same offense of loitering in a public toilet which you served 30 days.

A. I've never been there.

Q. You only served one 30 day period, is that right?

A. Yes.

Q. You were a minister at the time the two crimes which you've testified to, were you not?

A. At the time I wasn't a minister---I was a minister then but I wasn't in duty because my home was on the verge of broken up and I had trouble at home and I had to give up the pastorate. I did not have anywhere to stay so that---

Q. Well, when did you to on duty at the Methodist Episcopal Church in Albany, New York? When did you first assign in any manner to the Methodist Episcopal Church in Albany, New York?

A. That was in '58.

Q. '58 is when you were convicted, were you not?

A. In '59.

Q. You went there in '59?

A. Yes.

Q. Prior, Reverend Lesley Smith, to going to the Methodist Episcopal Church of Albany, New York, what were your pastoral duties?

A. What was my pastoral---

Q. Yes.

A. Well, I was doing evangelistic work at that time.

Q. Were you doing evangelistic work when you were convicted of this 30 day offense that you served time for?

A. At that time I wasn't in the ministry.

Q. When did you leave the ministry.

A. I went at this time---I was in trouble at home and I was working at the Peter Cooper Hotel.

Q. You left the ministry and worked at the Copa Hotel?

A. The Peter Cooper Hotel.

Q. When did you leave the ministry?

A. Well, I leave the ministry between---not leave, I wasn't active in '55 and '56 part of the time, on and off, so to speak.

Q. You were not active in '55 and '56?

A. Part of the time.

Q. Were you active in '58?

A. '58, part of the time.

Q. Then I am assuming the time you weren't active you were loitering in public toilets, is that your answer?

A. No, I wouldn't say that.

Q. That was your two convictions that you admit, wasn't it?

BY MR. JACKSON: Your Honor, now I'm perfectly willing for counsel to just go on, but I think all he can ask the witness is about these two incidents and he's given his best answer. I think that's as far as he can go but I'm perfectly willing, if your Honor want him to go on, to let him go on and not object to it.

BY MR. MUSLEH: I would like to, your Honor. He's set forth his occupation here, his memory all of a sudden is failing--

BY MR. JACKSON: Your Honor, these arguments here as addressed to the jury, I believe, and I'm trying to be extremely fair, that he can examine the witness relative to any accusations or crime. I disagree with the crime he has presented here before the court as being legitimate, and I'll argue that at the proper time, but I say he can examine him in connection with them but to ask him the questions he's just mentioned a moment ago is argumentative, and it's certainly not in response to a question that the witness could, in fact, answer.

BY THE COURT: The court is going to overrule the objection and ask counsel not to become argumentative in his questioning.

BY MR. MUSLEH: I have not, your Honor, at all.

Q. **BY MR. MUSLEH:** Now, you entered the ministry in 1954, is that correct?

A. 1954, oh, yes.

Q. And in 1955 and '56 you sort of took a leave of absence, is that right?

A. I would say take a leave of absence, but you can't do your best if your home isn't at peace.

Q. Now, you went back into the ministry in what year?

A. Well, I couldn't give you it because it was within months because sometimes it seems there was some reconciliation, and it was flexible, so to speak.

Q. So your entire tenure in the ministry has been very flexible, is that your answer?

A. Yes, until '59, so to speak.

Q. Incidentally, Reverend, where did you serve these 30 days at, do you remember?

BY MR. JACKSON: Your Honor, again, that question is irrelevant.

BY MR. MUSLEH: Your Honor, it's going to his veracity.

BY MR. JACKSON: It's not going to his veracity.

BY THE COURT: He hasn't testified, I don't believe---

BY MR. MUSLEH: All right. That's okay.

Q. **BY MR. MUSLEH:** Now, you have testified here---what are your duties in the church?

BY MR. JACKSON: Objection, your Honor. There, again, that's not responsive to the direct examination of this witness. I did not examine anything about the church.

BY THE COURT: The court is going to overrule that. The witness has testified as to his occupation.

Q. **BY MR. MUSLEH:** He certainly has. Now, you say that you are Reverend Smith. What are your duties in your church?

A. Well, my duty in the church is to administer unto the people.

Q. To administer what unto the people?

A. To administer sacrament or visit them and lecture to them and comfort them.

Q. Has that always been your duty since you've been a minister?

A. It has always been my duty since I've been a minister.

Q. Is that right?

A. Now since I've entered into the ordination, the circumstances alter the situation.

Q. What situation is altered by what circumstances?

A. Well, first of all, at the time that I couldn't work in the ministry and my home at the time was in an uproar, and I didn't have too much to do, no where to go, and that is one of the times that I---

Q. Is that your answer to the question of why you pled guilty to loitering in a public toilet?

BY MR. JACKSON: Your Honor, again I object to it, your Honor. That's improper question as to why he pled guilty.

BY MR. MUSLEH: I don't mean my question to be that way.

BY MR. JACKSON: That's the question you asked.

Q. **BY MR. MUSLEH:** Let me rephrase it. At the time you pled guilty to loitering in a public toilet, the facts were that you had no place other to go than to go in the public toilet, is that right?

A. I was coming from work or going to work. I'm sorry. On one occasion I was coming from New Haven and it was late, the first time it was about 12:00 in the evening when I went in, and then while I was there I was thinking where could I go or should I go to the Y.M.C.A. or something like that, and while I was there then the officer came in and asked me what I was doing here and I said well, I'm making my mind up, so he said okay, I'll find you some place to go. Then he took me and I was loitering in the toilet.

Q. That officer up there is as bad as Mr. Geiger is down here, isn't he?

BY MR. JACKSON: Objection, your Honor.

BY THE COURT: Sustained.

Q. BY MR. MUSLEH: Were you performing any of your ministerial duties as a pastor of the Methodist Episcopal Church in Albany, New York, when you bought this bus ticket from Washington, D.C., to St. Petersburg?

BY MR. JACKSON: Objection, your Honor.

BY MR. MUSLEH: It was brought out on direct examination.

BY MR. JACKSON: Why he or was he or why he bought a ticket is immaterial and irrelevant.

BY THE COURT: I don't believe the question was that, counsel.

BY MR. JACKSON: Was he performing any of his duties?

BY MR. MUSLEH: That's right.

BY THE COURT: That's the question.

BY MR. JACKSON: What relevancy has that, your Honor?

BY MR. MUSLEH: He brings it out he was down here. Now, a person, your Honor, in unlawful assembly, his purpose is to incite a riot. That leaves very little burden upon the State. I intend to show his purpose and lay this predicate, his purpose and foundation when he left New York City or Albany, New York, what his purpose was and that this is an incident to the purpose upon which he was on that bus for.

BY MR. JACKSON: Your Honor, I examined this witness relative to purchasing the ticket and his destination only. That's all. I didn't ask him his purpose.

BY MR. MUSLEH: Your Honor, the State lays a predicate and proved that this man was not performing his duty, that he was paid and trained to do this.

BY MR. JACKSON: Your Honor, I object to this argument before this jury unless he can put evidence in connection with it from his own source.

BY MR. MUSLEH: I'm going to solicit evidence from him.

BY THE COURT: The court is going to overrule the objection.

Q. **BY MR. MUSLEH:** Did you purchase this ticket, this bus ticket from Washington, D.C., to St. Petersburg, Florida, out of your own personal monies?

A. I wouldn't say out of my own personal money because---

Q. Out of whose monies?

A. My conference solicited some money for it, my church solicited some money---

Q. Solicited some money for what?

A. In other words, the church gave me some money. They knew I was coming here. I was in conference at the time. Conference closed Sunday night and the Sunday the Bishop took the money up and offered us---gave it to us Sunday morning. I get money in the church--

Q. Gave you money for what Sunday morning?

A. For this---to come to---for the church---they knew that was---

Q. For what trip?

A. The trip that I made.

Q. Did you ask the conference to make this trip?

A. I did not ask the conference to make this trip.

Q. You were not performing your duties in the church at the time you made the trip, were you?

A. The conference asked---The Bishop asked if there is any volunteer that will go to Washington.

Q. All right. You volunteered?

A. And then I volunteered.

Q. To go to Washington?

A. And from Washington---to pick up our tickets from Washington down to St. Petersburg.

Q. Where was this conference at? Where was this conference being held at?

A. At Schenectady.

Q. How did you get from Schenectady, New York, to Washington, D.C.?

A. From Schenectady, New York, to Washington, 5 clergies and myself came down in a car.

Q. You drove in a car, is that right? Now, the monies that were given to you at your conference was given to you in Schenectady,--is that how you pronounce that thing?

A. Schenectady.

Q. Schenectady, New York, is that right, for you to buy a bus ticket?

A. It wasn't the entire bus ticket was given to us. It was a donation to us. May I say that I did not put my hands in my pocket and buy the bus ticket.

Q. That we're well aware of. How much was the donation that was given to you?

A. Well, to me personally I did not get the money inhand. The offering was taken up and was given to Reverend Leak who is one who was coming and had to buy gas and see us through.

Q. Reverend Leak had the money until you got to Washington, D.C., is that right?

A. Yes.

Q. Now, who bought your bus ticket from Washington, D.C., to St. Petersburg?

A. I don't know. The bus ticket was given to me at Washington.

Q. Who was it given to you by?

A. It was given---I don't remember the name of the party who gave me the ticket.

Q. Were you given any monies to eat on or for expenses on this trip?

A. If I was given any money to eat on or expenses for this trip?

Q/ Yes.

A. Well, first of all, I did get some money from my church.

Q. How much did you get from your church?

A. From the church they give me $28.00 Sunday morning.

Q. All right. What other monies did you get for this trip?

A. I think I did get another donation.

Q. What was the donation and from whom?

A. $25.00.

Q. From whom?

A. From, I think CORE gave that.

Q. Is that the group which calls themselves the Congress of Racial Equality? Is that the group?

A. I'm not sure what they call themselves.

Q. As a matter of fact, CORE bought your ticket, did they not?

A. I'm not sure whether or not CORE bought the ticket.

Q. Do you mean that you're asking this court to believe that you went on a trip not knowing--is that your answer--who purchased the tickets?

A. Well, it was an invitation along with a volunteer movement.

Q. Volunteer movement?

A. It was told to me that I wouldn't--that was the first thing I asked.

Q. What was the first thing you asked?

A. That I didn't have the funds to go.

Q. Well, who invited you, you say it was an invitation, by whom?

A. Well, Again, I repeat that the Bishop make the appeal.

Q. Would you tell us the Bishop's name, please?

A. William Jacob Walls asked for volunteers.

Q. And you volunteered. Let's get you in Washington, D.C. Who handed you a bus ticket in Washington, D.C.?

A. I don't remember the name of the individual who did that, but the ticket was given to me.

Q. The ticket was given to you at Washington, D.C., and this organization named CORE gave you $25.00, is that right?

A. Yes.

Q. And you've testified as to $28.00 from your church, $25.00 from Core, $53.00. Were you given any other sums of money or rewards for making this trip other than what you've testified to?

A. Any other sums---

Q. Of money or any rewards for making this trip other than what you've testified to?

A. The only else that I do receive is my fare in coming down because I didn't have it.

Q. Did you receive any monies other than the $53.00 which you've testified to you got in cash and your bus ticket?

A. No.

Q. That's all that you received?

A. That's all, and the assistance of my fare in coming down here.

Q. What kind of assistance did you get there in your fare in coming down here?

A. Well, I got a plane ticket.

Q. A plane ticket? Where did you get a plane ticket to?

A. To Jacksonville.

Q. From where to Jacksonville?

A. From New York.

Q. You went from New York to Jacksonville? Reverend, I'm confused. I thought you went from New York to Washington and got on the bus.

A. I'm sorry. I thought you meant when I'm coming down to trial.

Q. No, this trial here---no. Let's get back to the bus trip. Now, were you offered any other rewards other than you've testified to thus far in the making of this trip?

A. No.

Q. Reverend, let me ask you this question. Did you have any training whatsoever for the making, and you can answer me without looking at your counsel, if you will, please---

BY MR. JACKSON: Again, he can answer any question, counsel, that you ask him. I'm not telling him what to say.

Q. BY MR. MUSLEH: Did you have any training whatsoever by any group prior to your making of this trip?

A. Yes, I did.

Q. What group trained you and where?

A. I was trained by the same group, CORE, nonviolent training and at Washington.

Q. How long was your training period by CORE in Washington?

A. Well, we reached Washington 9:00 in the morning and I don't know how many hours it took, but in Wahington 9:00 in the morning, Monday morning, and we leave on Tuesday morning.

Q. Did you come directly from Washington, D.C., to Ocala, Florida?

A. When you say directly, what do you mean, you mean without stopping?

Q. Not without stopping. Did you buy any other tickets or were any tickets bought for you from the time you left Washington, D.C., until the time you got to Ocala?

A. No, no other ticket bought for me.

Q. Now, the ticket which was handed to you by CORE in Washington, D.C., was a fare straight through to St. Petersburg, Florida, is that correct?

A. Yes.

Q. You're sure about that?

A. Definitely. From Washington to St. Petersburg.

Q. How were you going to get back from St. Petersburg to Albany, New York?

A. Well, St. Petersburg was the bus stop and then from St. Petersburg we take a plane back to New York.

Q. Reverend Lesley Smith, let me ask you a question. Are you a member or have you been a member of any organization that advocates the overthrow of the United States Government?

A. No.

Q. You are not a member now?

A. I have never been a member of any organization. The only organization that I've been a member of is of this church, no other organization.

Q. No other organization?

A. No other organization.

Q. You're not even a member of CORE, is that right?

A. Not a member of CORE.

Q. You're not even a member of NAACP, is that right?

A. That's perfect, not a member of NAACP.

Q. You're not a member of any Communist-affiliated organization, are you?

A. No, not a member of non.

Q. Do you vote in the State of New York?

A. No, I don't vote in the State of New York.

Q. You are not a resident or not a national of the United States Government, is that right?

A. No.

Q. Do you have alien registration status with the United States Government?

A. Yes, I do.

Q. Where do you register every January, which is alien registration month, is it not? Where do you register?

A. Well, since I've been in Albany, I've registered in Albany.

Q. What country do you claim to being a national or a native of?

A. The Commonwealth.

Q. The Commonwealth of Britain?

A. Yes, a Colony of Britain.

Q. How many members of your group were with you when you arrived at the bus station on the bus in Ocala, Florida?

A. How many?

BY MR. JACKSON: There again, your Honor, I have not made any questions about him arriving with any group on my examination.

BY MR. MUSLEH: I'll make him my witness and ask him now.

BY MR. JACKSON: You can't make the defendant a witness.

BY MR. MUSLEH: I just made him. The court can rule on it. Your Honor, I've got a right to inquire. He gets him in the bus station, he puts him in the door, he got blocked, he bought a ticket from Washington and counsel says who,,you can't ask him if there was anybody else with him.

BY THE COURT: The court is going to sustain the objection.

Q. BY MR. MUSLEH: Were you by yourself in the bus when you left Washington, D.C.?

BY MR. JACKSON: Objection, your Honor. That's the same question but indirectly by counsel.

BY THE COURT: Same ruling.

Q. **BY MR. MUSLEH:** Were there anyone on the bus whom you knew when you came into Ocala, Florida?

BY MR. JACKSON: Your Honor, I'm going to object again on the same basis. I have not asked this witness anything about who was with him or how he traveled.

BY MR. MUSLEH: Your Honor, throughout this entire testimony and I ask the court to look at the record this witness has used the plural "we left New York", "we left Washington", and "we got to Ocala".

BY MR. JACKSON: And all of those statements were made relative to questions asked by counsel on cross examination and not by me on direct examination.

BY MR. MUSLEH: I don't care when he made the statement. He can't limit his testimony to just exactly---He says "we were trained", "we left", "we bought tickets". Tickets weren't bought by him. Someone else bought it and gave it to us. That record is full of we and us and, your Honor, I want to know who these we's and us's are.

BY MR. JACKSON: Your Honor, he's got a right to do it, but not in this manner, and I object, sir.

BY THE COURT: Sustained.

Q. **BY MR. MUSLEH:** Let me ask you this question. Isn't it a fact at the time you say you were blocked by Mr. Owens that there was other people along with you at that particular time?

A. Oh, yes.

Q. Who were these people?

A. Well, Mr. O'Connor was with me at the time.

Q. Who else?

A. Shortly after that, Mr. Callender joined us.

Q. What about Mr. Winston?

A. Who is Winston?

Q. What about Stern? What about Winston, you don't know a Winston?

A. He wasn't with us at the time that we were blocked.

Q. He wasn't with you?

A. I didn't know where he was.

Q. Do you know a witness who was here in this courtroom today as your witness by the name of Stern?

A. Oh, yes, I do know him, but he wasn't with us while we were blocked.

Q. What was the name of the other witness along with Stern which you called in this courtroom today?

A. I forget his name, but he wasn't with us at the time that we were blocked.

Q. Was he a colored boy?

A. Yes.

Q. Was he in the bus with you?

A. Oh, yes, he was in the bus.

Q. Did that boy eat at the Greyhound Bus Station at the time your bus stopped in Ocala, Florida?

A. I couldn't say.

Q. You couldn't say. You can't deny that he didn't eat there, can you?

A. I couldn't say that because I was trying to get in when I was blocked.

Q. Where was he at the time you left the bus? In other words, did he leave before you or did you leave after him?

A. I'm not sure because after the bus came everybody was coming off the bus and then we came off and then we-----

Q. How many members of your party was it on the bus?

BY MR. JACKSON: Objection, your Honor. I think counsel has good sense and he knows your Honor has already ruled in connection with this matter.

BY MR. MUSLEH: Your Honor, the witness has been presented by the defendant. It's his witness and I'd like to inquire-

BY MR. JACKSON: No witness has been presented on this stand by anybody.

BY THE COURT: Objection sustained. Proceed.

Q. **BY MR. MUSLEH:** You say---Did the gentleman who testified here today identify himself as Deputy Sheriff Geiger ask you and, also, the three men that you saw on the stand this morning to leave the premises of the bus station?

A. Well, I heard the statement---

Q. Reverend, can't you say whether he did or he didn't?

A. I didn't know if he was the one who did it because there was other gentlemen with him.

Q. Did the Sheriff ask you?

A. Yes, the word was spoken.

Q. Who spoke the word?

A. One of the men, I don't know which of them.

Q. Which of the men?

A. Those that were neatly dressed.

Q. Were the neatly dressed men the two that was on the stand here identified themselves today as Deputy Geiger and Sheriff Willis?

A. Yes, they were.

Q. How many times did those neatly dressed men ask you, along with the other people, to disperse and leave the premises?

A. I honestly couldn't say how many times that they did make the statement.

Q. Was it more than once?

A. It was more than once.

Q. Was it more than twice?

A. I'm not sure, maybe more than twice.

Q. Maybe more than 3 times?

A. Maybe, because perhaps I don't hear it.

Q. Did the white people leave there?

A. Well, I didn't know whether the white people leave because it was so sudden and everything was coming----

Q. Did you see them any more?

A. The next thing I know I was crowded around with the officers--with these gentlemen and then I was outside and being ushered to the car.

Q. Are you saying, Reverend Lesley Smith, a man of God, that you on this stand will not say whether the white people left there when the officer told them? Is that your testimony, Reverend Lesley Smith?

A. I cannot say that they really left at the time because I was at the time in the midst of this. I were being pushed outside and I didn't have time enough to look behind me and see who were going out, while we were outside, the sheriff said you are under arrest, and we were ushered to the car.

Q. Oh, let me get this straight. The Sheriff didn't take you outside and ask you all to leave, is that right? Is that your testimony, Reverend Lesley Smith?

A. We was outside. In other words, pushed outside.

Q. You were pushed outside?

A. When I said pushed, I meant that they were coming at us.

Q. Who was coming at you?

A. The same gentlemen who mentioned two witnesses this morning.

Q. Owens, was he coming at you?

A. Yes, with his hands like this.

Q. And he pushed you?

A. He didn't push me.

Q. Did he touch you in any way?

A. No, he didn't touch me but there was---

Q. How was he pushing you out the door?

A. He was coming towards me and I was trying to get out, in other words, to hinder him from getting to me.

Q. He never touched you. You backed out when he came to you, is that your testimony, Reverend Lesley Smith?

A. He was coming towards me and then I backed---do like--in other words, trying to get away from him because the more he come, the more the rest of the folks was coming down on me so that---

Q. Oh, there was more folks other than him coming at you?

A. In other words, the officers were there.

Q. All right. How many folks was coming at you, Reverend Lesley Smith?

A. I'm not sure.

Q. Was there more than one?

A. Oh, yes, it was more than one.

Q. Was it more than two?

A. Oh, yes, it was more than two.

Q. Was it more than three?

A. Yes, it was more than three.

Q. Was it more than four, Reverend Lesley Smith?

A. I'm not sure because----

Q. Can you say it was more than four?

A. Yes, I could say-----

Q. Can you say it was more than five?

A. I couldn't say because I don't know how many it was.

Q. These men that were coming at you, were they coming at you in anger?

A. No.

Q. Why were you moving outside?

A. Well, he was coming towards me, in other words, using these words that no negro in this place and---

Q. Who said that?

A. Mr.---the gentleman that--

Q. Was it Owens?

A. None of the officers said that.

Q. Was it the man who testified that you stepped on his toe?

A. Yes.

Q. Did he say that to you inside the bus station?

A. Inside the bus station.

Q. When he said that, you backed up?

A. When he said that to me and was coming down towards me, then I---Mr. O'Connor says to me, now, the lunch counter is this way, and he took my arm and I was going, and just as I was going then they were coming down toward me and I find myself next thing outside.

Q. Reverend Lesley Smith, you have identified Mr. O'Connor as being a college professor at New York University. You wouldn't change your mind and say he taught at Bernard College in New York, would you?

A. I'm sorry, it may have been----

Q. Is that the man sitting in the courtroom here?

A. Yes.

Q. Do you see him?

A. Yes, that's---

Q. Do you see him sitting back there?

A. Yes.

Q. You know who he is, don't you?

A. Oh, yes, I do.

Q. Did that man start swinging his arms and shoving when these people came to you?

A. That I didn't see.

Q. You didn't see it. Why did you back up?

A. Because they was coming down---In other words, they was coming down on me and I didn't know whether it was angry or just--

Q. Oh, that's when the officers came in and broke it up, is that right?

A. Well, there was nothing for---the officer came down and called them and asked them to go.

Q. And he asked you to go, too, didn't he?

A. And he asked them to go, yes.

Q. Asked you to go, too?

A. Yes, he did, and I told---

Q. He asked only the three of you that were right in your or you and two more that were right in your group, that's the only three he asked of your group to leave, was it not? Isn't that the truth?

A. Yes.

Q. The rest of your group was in the bus station, isn't that the truth?

A. I am not sure where the rest of the group were.

Q. You refused to get back on the bus when the officers broke up Owens and the group who was coming toward you, is that right?

A. No, this I would like to make clear. I did not know that they were officers.

Q. They didn't tell you they were officers?

A. I didn't know they were officers.

Q. Did he say that he was an officer?

A. Not that I hear.

Q. Did Sheriff Willis say "I am Sheriff Willis"?

A. He may have said that, but I didn't hear that.

Q. Have you got eyes? Do you pride yourself on good eyes?

A. Pretty good.

Q. Did you see a badge in the lapel of Sheriff Willis's coat?

A. Well, I didn't notice him that close.

Q. When the man said, if you don't leave I'll have you arrested, did you think they were Boy Scouts at that time?

REPORTER: (No audible answer.)

Q. Did you?

A. Well, at the moment I didn't know whether or not they were officers.

Q. Did you ask?

A. No, I didn't ask.

Q. When he says I'll arrest you, you didn't ask, is that right?

A. This thing happened so quickly I did not have time to ask any questions.

Q. It happened so quick that you said over 4 times these men asked you to leave. Now, how much time are you allowing for this?

A. But we could say one word over 4 times in a short time.

Q. Is that what he did, will you leave, will you leave, will you leave, will you leave, is that what you're saying under your oath or your affirmation before your God, is that what you're saying happened down there, Reverend Lesley Smith?

A. I didn't say that.

Q. Well, tell me what happened. What happened when the officer came up there?

A. Well, the officer came up there---he asked---he said, well----he asked the gentlemen, he said okay, okay, you go home. Yes, this is the words he used, you go home, and then he turned to us and said, you go back on the bus, and then we said we're interstate passengers and at that time I said I would like to get a glass of milk and then Mr. O'Connor said----

Q. Don't tell what O'Connor said, you just say what you said and what the officer said.

A. And then the officer said to us, go back on the bus or you'll be arrested, and then---

Q. How many times did he say that to you?

A. I don't remember.

Q. Your memory is shot on that question.

A. I don't remember only---

Q. Your memory to that is like these convictions you don't remember.

A. I don't remember how many times he used the words.

Q. You were put in enough fear, were you not, Reverend Lesley Smith, of physical violence being done to you that you backed out of the bus station when Owens approached you, is that right?

A. I wouldn't say that I was put into enough fear. All that I was trying to do I was trying to avoid him coming down towards me.

Q. He had his hands up like in this position, did he not, coming toward you? Did he say the words no negroes coming in here, isn't that what you said?

A. Yes, he made the statement

Q. Were you backing up at that time?

A. Yes, I was near to the door so then I started to go back.

Q. Why were you backing up if you weren't in any fear of any violence being done to you?

A. It was not a matter of saying fear of violence done to me, but it's just a matter of saying that if he's coming down to me it wouldn't be wise to go into him.

Q. Why did you back up? Is that your reason?

A. Just because it was much wiser to back up from him than going into him, back away from him than going into him.

Q. Reverend, I'd like to ask you, you do spell your name Leslie Smith, do you not?

A. Yes.

Q. And on your F.B.I. record you admit two convictions and you deny the other two, do you not?

BY MR. JACKSON: Objection, your Honor, to this question being repeated. Counsel has gone into it at length. It's repetitious and consequently I enter a motion that he be denied the right to ask this question again.

BY THE COURT: The court is going to sustain the objection.

BY MR. MUSLEH: That's all.

BY MR. JACKSON: The defense rests, your Honor.

BY MR. MUSLEH: I might say it was a surprise. I'd like to call now, your Honor please, and ask the court to call as court witnesses so-called Dr. Stern and if counsel, I believe, your Honor, has the name of that other witness up there. Will he state what it is. He gave two names---

BY THE COURT: Bennie Winston was the other name, I believe.

BY MR. MUSLEH: I'd like to call as court witnesses Bennie Winston and Dr. Stern.

BY MR. JACKSON: Your Honor, if counsel want to call his witness, he can call them for the State. It's all right.

BY THE COURT: All right, who did you wish to call first, Mr. Musleh?

BY MR. MUSLEH: Bring in Bennie Winston, please.

BY THE COURT: The court will declare a 5 minute recess.

H. A. GEIGER, being recalled to the witness stand, further testified as follows:

REDIRECT EXAMINATION

Q. **BY MR. MUSLEH:** Mr. Geiger, at the time you arrested the defendant, Lesley Lee Smith, did you arrest any other person?

A. Yes, sir.

Q. Who were the names of the other persons?

A. **BY MR. JACKSON:** Objection, your Honor. This witness is not coming in rebuttal to anything I brought out on direct.

BY MR. MUSLEH: He doesn't have to rebut what you brought out---

BY MR. JACKSON: Yes, sir, a rebuttal is limited, your Honor----Your Honor, the rebuttal given by the prosecution must address itself to something that was brought out on direct because he's had his day in court, he's closed his case, and he cannot bring anything in evidence other than what I put in evidence, in rebuttal to that.

BY MR. MUSLEH: Your Honor, the defendant has put into evidence that the defendant through his testimony was backing out, the defendant has said that O'Connor was with him or there with his arms over to his left. This has been brought out by the defendant as to what took place at that time. Now, I am putting rebuttal testimony on as to what took place at that time.

BY MR. JACKSON: Are you rebutting that the defendant did not have---Mr. O'Connor did not have his arm on the defendant?

BY MR. MUSLEH: I'm not telling you what I'm bringing out. I put the man on for rebuttal.

BY MR. JACKSON: Your Honor, he's asking about who he arrested and I'm simply saying, your Honor, that that is not in rebuttal. I brought out no question relative to arrest.

BY THE COURT: The court is inclined to agree with the defendant.

BY MR. MUSLEH: Let me ask this question.

BY THE COURT: All right.

Q. **BY MR. MUSLEH:** Was the defendant, Lesley Lee Smith, by himself in the gathering at the bus station at the time you ordered he and 5 others to disperse?

BY MR. JACKSON: Your Honor, he has examined him on this point. I did not bring anything out on my direct examination.

BY MR. MUSLEH: Your direct testimony here is that the defendant himself has brought out in this case. That's the gist of this case. This charge, your Honor please, charges that Lesley Lee Smith did unlawfully meet with two other persons, Callender and O'Connor. Oh, it would be tremendous if he would run his case, if he could keep those names out of this case.

BY MR. JACKSON: What I brought out on direct examination your Honor, cause him to be able to rebut that?

BY MR. MUSLEH: He brought out O'Connor himself. This man brought out O'Connor's name into this case. We are charging the defendant, your Honor. Look at the affidavit here. He did unlawfully meet with two other persons, to-wit: Herbert Ebenezer Callender and James Richard O'Connor.

BY THE COURT: The court is going to overrule the objection.

Q. BY MR. MUSLEH: Was he by himself, the defendant, Lesley Lee Smith?

A. No, sir.

Q. Who was he with?

A. O'Connor and Callender.

Q. Is that James Richard O'Connor?

A. Yes, sir.

Q. Is that Herbert Ebenezer Callender?

A. Yes, sir.

Q. Did you receive anything for these three defendants after you arrested them?

A. Yes, sir.

Q. What?

A. We received a Western Union money order and a telegram from----

BY MR. JACKSON: Your Honor, there again I'm---

BY MR. MUSLEH: Let him finish his testimony!

BY MR. JACKSON: I'm objecting.

BY MR. MUSLEH: Well, you ain't objecting until he gets through with his testimony.

BY MR. JACKSON: I'm objecting because he can't say it before this witness, this jury.

BY THE COURT: What was your question there, now?

BY MR. MUSLEH: My question was---just a minute. Read it back. He's going to let him answer his question, your Honor please.

BY MR. JACKSON: Your Honor, the purpose or objection is to keep this particular testimony which is irrelevant from the jury.

BY MR. MUSLEH: -----after the question is made. You don't interrupt---

REPORTER: (Both attorneys talking at once.)

BY THE COURT: Counsel will please---What was the question?

REPORTER: There is two question. "Q. Did you receive anything for these three defendants after you arrested them? A. Yes, sir. Q. What?"

BY THE COURT: The question was what, and you object to the question of what?

BY MR. JACKSON: Yes, sir, I'm objecting to the answer to the question, your Honor, on the grounds that what he is going into now was not in rebuttal to anything that was brought out on our direct examination.

BY MR. MUSLEH: It is directly concerned with the direct examination. You've got to go back to the charge itself in this case.

BY THE COURT: The court is going to sustain the objection.

Q. **BY THE MUSLEH:** You arrested the three together, is that right?

A. Yes, sir.

Q. They were here together?

A. Yes, sir.

Q. Did you receive a single check for their cash bond---

BY MR. JACKSON: Objection, your Honor.

BY MR. MUSLEH: Your Honor, he's not going to object until I get through asking the question. Now, let me ask my question.

BY THE COURT: Go ahead and ask your question.

Q. BY MR. MUSLEH: Did you receive one check from one single outfit or organization to bond out all three defendants, to-wit: Lesley Lee Smith, Herbert Ebenezer Callender and James Richard O'Connor?

BY MR. JACKSON: I object now, your Honor.

BY THE COURT: Sustained.

BY MR. MUSLEH: Your Honor, that's the essence of this case here. Were all three defendants bonded out by the same person?

BY MR. JACKSON: objection again, your Honor.

BY THE COURT: Sustained.

Q. BY MR. MUSLEH: Did the defendants tell you that they arrived and met here together?

A. They told me they arrived on the same bus and they wanted to go in and eat together.

Q. They were together and they arrived here together?

A. Yes, sir.

Q. Did they leave Ocala together?

A. Yes, sir.

Q. Did they leave in the same transportation? Did you see them when they left?

A. I didn't. Another officer.

Q. Who was the other officer?

A. Mr. Coward.

Q. He saw them when they left, is that right?

A. Yes, sir.

Q. Did CORE wire $3,000.00 to you---

BY THE COURT: Mr. Musleh, the court has already sustained the objection.

BY MR. MUSLEH: I haven't asked it in this manner.

BY THE COURT: Yes, sir, but that's along the same line and the court would ask you to refrain from asking that.

Q. BY MR. MUSLEH: Did Lesley Lee Smith, Herbert Ebenezer Callender and James Richard O'Connor talk to each other and call each other by their names at the bus station?

A. Yes, sir.

Q. Did they carry on a conversation with each other, also, at the county jail?

A. Yes, sir.

Q. They were acquainted with each other at that time?

A. Yes, sir.

Q. They arrived together on the bus here in Ocala, Florida?

A. Yes, sir.

RECROSS EXAMINATION

Q. BY MR. JACKSON: Mr. Geiger, you said they arrived together on the bus. Did you see them arrive on the bus?

A. On the bus? I didn't see them get off the bus.

BY MR. JACKSON: That's all.

REDIRECT EXAMINATION

Q. BY MR. MUSLEH: They told you they arrived together?

BY MR. JACKSON: Objection, your Honor.

BY THE COURT: The court's going to sustain the objection

Q. BY MR. MUSLEH: Did you see the three of them together at the bus station?

A. Yes, sir.

Q. Did this commotion you testified to involve the three of them?

A. Yes, sir.

BY MR. MUSLEH: I'd like to call Herbert Ebenezer Callender to the stand.

BY MR. JACKSON: Your Honor, at this time the defense rise to Mr. Callender and objects toohis giving testimony as he is a defendant to be tried before this court.

BY MR. MUSLEH: He's not a defendant in this case.

BY MR. JACKSON: He's still a defendant to be tried before this court.

BY MR. MUSLEH: How do you know I'm going to try him? He's not a defendant in this case, your Honor. He's mentioned as one the complainants engaged in unlawful assembly in the affidavit. I'm calling him to the stand.

BY THE COURT: The court is going to overrule the objection.

BY MR. JACKSON: The lawyer advises the defendant to refuse to testify on the grounds that he's to be brought before this court and it will be to raise the Fifth Amendment on the grounds that he will certainly--at the present time is under and information and any testimony he gives may subject him to prosecution.

BY MR. MUSLEH: Your Honor please, this is not a defendant in this case. The witness hasn't raised this question at all, your Honor. I don't think counsel can raise the question. If it's to be invoked, it's to be invoked by the witness, not by counsel.

BY MR. JACKSON: You wanted to know what I instructed him to say.

BY THE COURT: Did you wish to claim your right to the Fifth Amendment?

BY MR. CALLENDER: Yes, sir, I do, your Honor.

BY MR. MUSLEH: Your Honor, can you put him on the stand and let him claim that in the record, please?

HERBERT EBENEZER CALLENDER, being duly sworn, testitied as follows:

DIRECT EXAMINATION

Q. **BY MR. MUSLEH:** Will you state your name?

A. Herbert E. Callender.

Q. Known as Herbert Ebenezer Callender?

A. Yes, Ebenezer.

Q. Are you acquainted with Lesley Lee Smith, the defendant?

BY MR. JACKSON: Objection, your Honor.

A. I refuse to testify on the ground that it might incriminate me.

Q. **BY MR. MUSLEH:** It might incriminate you on what ground? Would you tell us how that testimony would incriminate you?

BY MR. JACKSON: Your Honor, as counsel for this particular witness who is presently under an information to appear before this court for trial, the grounds upon which this defendant refuses to testify is obvious in that it may be testimony relative to the case for which he is presently under information.

BY THE COURT: The court will sustain the objection.

BY MR. MUSLEH: That's all. Step down. I'd like to now call James Richard O'Connor.

JAMES RICHARD O'CONNOR, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. **BY MR. MUSLEH:** State your name, please.

A. James Richard O'Connor.

Q. What nationality are you, Mr. O'Connor?

BY MR. JACKSON: Objection, your Honor.

BY THE COURT: What grounds do you wish to object upon, counsel?

BY MR. JACKSON: Your Honor, like I said this witness--we've raised first the Fifth Amendment. He's charged under an information in this particular court to appear in court for trial.

Any testimony he'd give relative to any matter involved here may subject him to future prosecution.

BY MR. MUSLEH: Your Honor, I think the law is well established if that's to be raised, it's to be raised by the witness and not the defense counsel.

BY MR. JACKSON: All right, let him raise it.

BY MR. MUSLEH: I've asked him a question. Objection has been made and I believe the procedure now is for the court to rule upon the objection.

BY THE COURT: Did you wish to claim the Fifth Amendment?

A. Yes, I do

BY THE COURT: All right, so state in the record.

A. I wish to claim the Fifth Amendment.

Q. BY MR. MUSLEH: Want to claim the Fifth Amendment with reference to what?

A. In reference to refusing to testify at this moment.

Q. Refusing to testify in the case of State of Florida versus Lesley Lee Smith, is that right?

A. That's correct.

BY MR. MUSLEH: The State rests.

BY THE COURT: I believe you have opening and closing?

BY MR. JACKSON: Yes, sir. I want to make a motion.

BY THE COURT: All right. Do you want the jury to with--

BY MR. JACKSON: Yes, sir.

BY THE COURT: (Excusing the jury.) This concludes your case, does it not, except for your motion?

BY MR. JACKSON: Yes, sir. Your Honor, the defendant moves for a directed verdict of acquittal on the grounds that the State has failed to carry the burden of proving the essential elements of the crime of unlawful assembly. The State has failed to prove that there was a common design between the defendant and any other persons to breach the peace, or to do any other unlawful act. Your Honor, under Florida Statutes 870.02 the essential ingredients of the crime of unlawful assembly is, first, that there must be a proof that three or more persons met together to commit a breach of peace. That was their purpose. The State has not shown that the defendant met with anyone to commit a breach of the peace--that was the purpose of it-- or to do any other unlawful act. There were no unlawful acts that were shown to be the purpose and intent of the defendant and three other persons, two other persons, at least. In other words, what unlawful act has the State proved these defendants were attempting or had agreed to commit? Not other persons, but these defendants. It appears, your Honor, that he cannot say that Mr. Owens was a member of the so-called three, nor any other persons that were there because the State has only put in evidence or attempted to put in evidence through indirection that there were three persons, namely, the three defendants named in the charges brought before this court. Surely Mr. Owens was not a so-called member of this group. Surely the other witnesses that were presented here were not a member of this group. Surely the two officers who appeared were not members of this so-called group and this court and this particular statute requires that when three or more persons meet together, they meet together, themselves and among themselves to commit a breach of the peace that that is their purpose, or to do any unlawful act. Incumbent upon the State is the responsibility to show that they met to breach the peace or to do some unlawful act. Now, what was the unlawful act that they have agreed to do? Surely, your Honor, it cannot be said that it is unlawful for an interstate passenger to use the facilities of a bus terminal. Surely it could not be said that it was a breach of the peace even if the incident occurred as shown by the so-called evidence in this matter that the defendant here was backing away, rather than moving forward in connection with a contestant if there should, in fact, have been one. It was no showing that the defendant, along with two other persons, assisted each other in doing anything. In fact, the evidence was quite to the contrary. So where has the State shown that there was a meeting together of three people whose purpose it was to breach the peace or whose purpose it was to do an unlawful act? There's a fatal variance, your Honor, in the evidence in this case and the statute upon which the charges are brought and we believe, your Honor, that unless the State proves each of the elements of the crime alleged to have been committed, except venue which we concede the State does not have to prove and the fact that the crime took place within two years, that if there's a variance or failure of evidence that the State has by virtue of that failure failed to prove the case against the defendant. The Statute requires three people. The only testimony that you have here, your Honor, relative to three people was when apparently the officer was telling them to move and he arrested three people. Under our statutes the sheriff can arrest anybody he desires, whether he arrests them legally depends upon the basis of that arrest. Now, the basis of the arrest in this case is predicated on the fact or supposed fact that there was, first, an unlawful assembly. You cannot put in process an enforcement of a matter which causes it to revert back to the time that the officer appeared and say that was unlawful assembly. In other words, when the officer was supposed to have been exercising his authority under this statute and under the other statute, he must have determined at that time that there was an unlawful assembly. Now, they're not charged for rioting. Unlawfully assembling, your Honor, means that there must be an agreement of the parties involved who are charged with unlawfully assembling and they themselves, not Mr. Owens, not in conjunction with Mr. Owens, but they themselves in conjunction with one another were engaging in an act that was, in fact, a breach of peace. They could not be held responsible for the conduct of Mr. Owens or the conduct of any other person who may be in error, for if that were so, you or any other person could go to the bank tomorrow and if a crowd gathered out and said don't you go in the bank and started fighting among themselves, they could say well, I started a riot or I was responsible for an illegal assembly when I was not. I was not a part of it. The people who were outside attempting to prevent X from going in the bank would be guilty if they happened to be there and acting in concert to be guilty of illegal---unlawful assembly, and all I'm saying to the court is that there's a fatal variance between the charges made and the information filed by the State and the evidence adduced from the witness stand in this case and, therefore, the defendant respectfully moves the court for a dismissal of this action. We further assert, your Honor, that the defendant had a constitutional right to be upon the premises of the bus terminal, that he had a constitutional right to use any of the facilities that are operated in conjunction with the operation of a bus terminal serving the interstate carriers. We say to the court that if this defendant could be directed by an officer to not use this facility regardless, your Honor, to the fact that someone else other than the company may have protested his using them that the defendant was legally upon the premises and it was the duty, if you please, your Honor, the duty of the law enforcement officers to protect an individual in the exercise of his constitutional rights, not to stop them from exercising them, but to protect them in the use of those particular rights. If your Honor say that Mr. Owens and, incidentally, Mr. Owens say he didn't strike anybody and he said that if he was pushed, he didn't know it and could have been, anyway he didn't have the intention of fighting. The other two witnesses that appeared before the court testified no, that they were not there to fight or to do anything, then what basis was there existing at the time the officers interfered with these defendants--this defendant for him to interfere. It appears that all the officer had to do was say if he saw some people standing up talking and he thought there was going to be some difference between those people to say to them, you go on where you're going and you go where you want to go, and that would have been the end of it. It is the apparent concept of the State that there is no question of segregation involved here, that the defendants have a right to be there, to use the facilities to whatever extent the facilities could be used, as long as it was done peaceful. Your Honor, there is not even in the record of this court one iota of evidence to say that the people spoke above a whisper, no profanity, and no argument. In other words, your Honor, if you walked into the bus terminal tomorrow and someone stopped and said what is your name and another man walked up and said what are you talking about, the officer can say get out and put you in jail for unlawful assmebly because that is what this amounts to. We again say, your Honor, that the defendant not only had a right to be there as an individual but he had a right to be there with other persons and this right to be there with other persons is insured and guaranteed under both the Federal Constitution and under the great State of Florida's Constitution, under our own constitution, recognized in this State and ______________________(Reporter: Several words could not be distinguished) for all people of these United States and of this State of Florida that people can meet and gather peacefully and in a nonviolent attitude to discuss themselves or for a common purpose. Our constitution say for a common purpose and to petition the Government and representatives, etc., so, your Honor, we say that under the laws of the State of Florida the defendant had a right to be there with other persons other than himself, that under the Federal Constitution of the

United States say, specifically, under the commerce act as ruled by the Supreme Court of the United States that the defendants as interstate passengers had a right to go on the premises and to use those facilities to their fullest extent without regard to race, color or creed, and that they were upon the property lawfully and lawfully using those particular facilities. That's all.

BY MR. MUSLEH: Your Honor, the State hasn't got the gist of the motion, yet, what it's based on. When these three defendants, when the defendant, plus the other two named in the affidavit, were told to remove themselves from the bus station and when they refused to do that is when the unlawful act occurred. No, counsel would rather have--says that there was no apprehension of a riot so he must remember when he says that of what happened in his back yard in Jacksonville with ax handles down at Hemingway Park, with gasoline bombs being thrown at each other's buildings, with cars being shot at riding down the street. That's what counsel would want you to say that that's the time the unlawful act and that is the time it's being committed. The purpose of this statute is to prohibit what was committed in his backyard. It was done and either we have it or we don't. We can either prohibit this when the officers have fear and apprehension and there was, there was enough fear for the defendant to have backedout of the bus station. There was enough fear for these officers to have broke them up, enough fear that when one of the white men returned, the sheriff had him removed from the premises of the bus station. Therefore, the State submits that the motion should be denied and proceed with the argument to the jury.

BY THE COURT: The court will deny the motion for directed verdict.

BY THE COURT: Court will be in recess for 20 minutes, until 8:00.

Thereupon court was resumed at 8:20 P.M. and arguments to the jury proceeded.

* *

CHARGES OF THE COURT

BY THE COURT: Gentlemen of the jury, this is rather an extended trial. You will be glad to know that the court will release you until 1:30 tomorrow afternoon in order that you may get your beauty nap in the morning. As you've been advised, this is the case of the State of Florida versus Lesley Lee Smith in which it is charged that on the 16th day of June of 1961 in Marion County, Florida, one Lesley Lee Smith did unlawfully meet with two other persons, to-wit: Herbert Ebenezer Callender and James Richard O'Connor, to commit a breach of the peace contrary to statute in such cases made and provided and against the peace and dignity of the State of Florida.

You have heard the evidence in this case and the argument of the attorneys. It now remains for me to give you in charge the law which applies to this case and it is your duty to accept the law as I now define it to you as the law of this case and to apply it to the evidence as you've heard if from the witness stand. The defendant is presumed to be innocent and such presumption remains and abides with him throughout every stage of the trial, unless and until removed to your satisfaction by competent evidence beyond a reasonable doubt. The defendant is entitled to the benefit of every reasonable doubt which may arise in your mind from the evidence or lack of evidence in the case. You cannot convict him of the crime charged unless you are satisfied of his guilt beyond such reasonable doubt.

A reasonable doubt is defined to be that state of a juror's mind where, after having heard and carefully considered all of the evidence in the case, he cannot say that he has an abiding conviction to a moral certainty of the guilt of the accused.

Such doubt must, however, as its name applies, be a doubt that is reasonable, one which reasonable men entertain after fully considering all of the evidence and one which arise from the evidence or each of evidence in the case, not a mere possible or speculative doubt. It is incumbent upon the State to prove to your satisfaction by competent evidence beyond a reasonable doubt every material allegation in the affidavit before you can convict the defendant of the crime charged. You are the sole judges of the testimony and the credibility of the witnesses. It is your duty, if you can, to reconcile all of the testimony of the witnesses and each of them, but in considering and weighing the testimony of the witnesses, you have the right to take into consideration their manner of testifying and their interest, if any, in the subject testified about and to believe or disbelieve any or all of such testimony according to you think it worthy of belief.

You have before you in evidence about previous crimes committed by the defendant. This evidence is not to be considered by you as proof of the crime for which the defendant is now on trial. Such evidence of this nature is permitted to come before you for the sole purpose of weighing the credibility of this defendant as a witness and for that sole purpose alone.

The numbers of witnesses does not control the jury's verdict. You may believe or disbelieve one against many or believe or disbelieve many against one. You are to decide this case upon the credibility of the witnesses, taking into consideration their manner of testifying, their attitude and conduct upon the stand, and their interest, if any, in the subject testified about.

The defendant has a right to become a witness in his own behalf and your consideration of his testimony and the weight and credibility which should be given by you to the same it is proper for you to take into consideration the interest which he has in the trial and its results, together with all the circumstances by which he is surrounded at the time he testifies and also the reasonableness or unreasonableness, probability or improbability of what he says just as you would the testimony or any other witness.

The court would further instruct you that under Section 30.15 of the Florida Statutes sheriffs in their respective counties in person or by deputy shall be conservators of the peace in their counties, suppress tumutls, riots and unlawful assemblies in their counties with force and strong hand when necessary, apprehend without warrant any person disturbing the peace and carry him before the proper judicial officer that further proceedings may be had against him according to law.

The section of the Statute involved here in Section 870.02 of the Florida Statutes which reads as follows: "If three or more persons meet together to commit a breach of the peace or to do any unlawful act each of them shall be punished by imprisonment not exceeding 6 months or by a fine not exceeding $500." Unlawful assembly is defined as a meeting or gathering of persons, three or more, with a common intent formed before or at any time during the meeting to mutually associate one another in the execution of a common purpose, lawful or unlawful, which would interfere with the rights of others by committing such acts of intimidation or disorder as are likely to produce danger to the tranquility and peace of the neighborhood and have a natural tendency to cause rational, sane, firm and courageous persons in the neighborhood to apprehend a breach of peace, neighborhood meaning vicinity. It is not necessary to this offense that the design or purpose be executed or put into execution but it is necessary that the defendant and the other persons named in the affidavit attempt or threaten to use force to attain their purpose.

The court further instructs you upon the question of intent on the part of the defendant that the law presumes that every person intends the natural and ordinary consequences of his act. Unlawful acts, knowingly or intentionally committed, generally cannot be justified on the ground of innocent intent. Ordinarily, the intent with which one does a criminal act is not proclaimed by him and, ordinarily, there is no direct evidence from which the jury may be satisfied from declarations of the defendant himself as to what he intended when he did a certain act and this question of intent, like all other questions of fact, is solely for the jury to determine from the evidence in the case. Previous acquaintanceship between the defendant and the others named is not necessary nor is it necessary that each person named in the affidavit should have seen the others or have knowledge as to who all the members of this common design or purpose are. It is not essential that the parties meet or that they confer or formulate their plan nor that each defendant or the others named have knowledge of the scope of the purpose or the means by which the purpose is to be accomplished, nor that at any time should have been set for the accomplishment of the design. Neither is it necessary that the plan of combination shall embrace and detail in its early stages the various means by which it is to be executed as it is sufficient that there is a general plan to accomplish the results sought by such means as may from time to time be found expedient.

Unlawful assembly implies a concert of design and not participation in every detail of execution and it is not necessary that every person named in the affidavit should have taken part in every act or know the exact part performed or to be performed by the others in the furtherance of the purpose.

The court further charges you that before you may convict the defendant or anyone of the crime of unlawful assembly the evidence must convince you and each of you beyond and to the exclusion of every reasonable doubt, that they and each of them actively and intentionally participated in the unlawful assembly alleged. Mere knowledge, acquiescence or approval of the alleged purpose without cooperation or agreement to cooperate is not enough to constitute one a party to the alleged unlawful assembly.

It is not necessary, however, that the State show that each person named participated in each and every single act or element embraced within the purpose, but you must believe from the evidence that each person named actively and knowingly participated in the furtherance of the common design as a whole.

You are further charged that under the laws of Florida it is not necessary for the State in the prosecution of an unlawful assembly case either to allege in the information or to prove at the trial any overt act. You will, therefore, be warranted in returning a verdict of guilty if you find from all the evidence in the case that the unlawful assembly of three or more was established in your minds beyond a reasonable doubt. Whether or not any overt act was ever committed by any of the defendants. The court further instructs you that if you find that the defendant is an interstate passenger traveling on a bus that stopped at a regular bus terminal and if you find that the defendant was in the process of using the facilities of said bus terminal in an orderly non-violent manner and that there were no acts of intimidation or disorder as are likely to produce danger to the tranquility and peace of the neighborhood and have a natural tendency to cause rational, sane, firm and courageous persons in the vicinity to apprehend a breach of the peace, then you must find the defendant not guilty.

Now, if you find the defendant guilty, the form of your verdict will be "We, the jury, find the defendant, Lesley Lee Smith, guilty as charged. So say we all." If you find the defendant not guilty, the form of your verdict will be: "We, the jury, find the defendant, Lesley Lee Smith, not guilty. So say we all." In either event, the verdict you select will be signed by one of your number as foreman. You may now retire to the jury room, select your foreman and consider your verdict.

BY THE COURT: The court would like to state for the record that it denied request for instructions numbers 1, 2, and 3 of the defendant, and gave charge 4 and 5, 4 being the charge about the previous crimes being for the purpose of weighing the credibility of the witness and 5 being the interstate passenger charge. Court will be in recess.

REPORTER: (10:25 P.M. the jury returned with their verdict.)

BY THE COURT: Gentlemen of the jury, have you arrived at a verdict?

FOREMAN: Yes, sir.

BY THE COURT: All right, will you hand it to the bailiff?

BY THE COURT: "We, the jury, find the defendant, Lesley Lee Smith, guilty as charged. So say we all.

M. E. Dean
Foreman

BY THE COURT: Thank you, gentlemen, and you are excused until tomorrow afternoon at 1:30 at which time you will return to the courtroom. You may now depart through the side door. What would your intentions be at this time? Do you wish to defer sentencing until you have time to file motions?

BY MR. JACKSON: Yes, sir.

BY THE COURT: All right, the court will defer sentencing until---

BY MR. MUSLEH: Your Honor please, I'd like to state that the defendant is still under the same bond as the court hasn't adjudicated.

CERTIFICATE

STATE OF FLORIDA)
)
COUNTY OF MARION)
.. ..)

I, Elva C. Woodis, do hereby certify that the case of State of Florida vs. Lesley Lee Smith was tried on the 5th day of July, 19 61; that I was authorized to and did report in shorthand the proceedings and evidence in said cause and that the foregoing pages numbered 1 to 110 inclusive, constitute a true and correct transcription of my shorthand report of the proceedings of said cause.

IN WITNESS WHEREOF I have hereunto affixed my hand this 25th day of August, A. D. 19 61.

/s/ Elva C. Woodis
Official Court Reporter

IN THE COUNTY COUR
FOR MARION COUNTY,

STATE OF FLORIDA

vs.

LESLIE LEE SMITH,
Defendant.

CHARGE: Unlawful As

Final closing argument given by the
County Prosecuting Attorney before
the Honorable Lewis O. Myer and a
Jury of 6, on July 5th, 1961.

[illegible]NCE E. WOLIN
[illegible]

State of Florida vs. Leslie Lee Smith
July 5th, 1961 -- 8:00 o'clock P. M.

COURT: Are you ready to proceed?

MR. MUSLEH: Yes, sir.

(Mr. Jackson makes his initial closing argument)

Mr. Musleh's argument is as follows:

To please the Court, let me say in all sincerity I have enjoyed, if you can call it that, being with counsellor. He is a very able attorney and I mean that in all sincerity, but every time a lawyer tries a case, especially in my work as Prosecutor and you get an able lawyer you always learn something, and I say Ernest Jackson is a capable lawyer and I don't think the Defendant could have gotten a better lawyer.

Now, let me say at the outset that I agree; yes, I agree with almost every statement which counsel made referring to deomcracy. I agree that millions of Americans have died to preserve it. The proudest heritage we can call ours is American but you can't. He didn't think enough and doesn't think enough of being called an American that he has even bothered to be a naturalized citizen of the United States, but instead is an alien in this country who reports once a year in Albany, New York to the Immigration Bureau.

Counsellor, when you are talking about democracy and America don't talk about that British subject who doesn't think enough for this country to bother. We know about his testimony being here in 1954. That is the type of man that CORE would send down here. Let me show you the ingenious method of counsellor.

There was a good article in the Readers Digest about a trial of this case. You have to read it. They compared it with sort of a game of chess with two lawyers planning witnesses, one trying to get to the Jury these facts, and the other trying to keep from the Jury these facts, and both of them trying to interpret what facts they are able to get to the Jury and the manner in which the Jury should accept it.

You learn in law school basically one principle which has been applied by counsellor in an ingenious manner. When you have got a rotten defense and no defense at all tear down the Prosecutor's case. Don't talk about your case. Tell the Jury all what the Prosecutor is going to tell you. Always do that and you sort of make light and try in your best manner to ridicule him because you have got nothing to fight and he told you -- I don't know what I am doing up here because he has told everything I am going to say and I can't make a counsel, a lawyer, a liar out of him, so I am going to have to tell you what he will say so we have to keep face at the bar.

Now, think first of all when we talk about the man. I questioned him of being a minister. Put that in the record.

"Have you been convicted of a crime?" Come on, counsellor, let's get it all in the record. Oh, this look of horror upon his face; what crimes? Let's look at the F.B.I record. You saw him swallow and nearly fall to the floor. Does he think the State is coming in to try a case like this blindfolded? Do you think that the State of Florida; do you think your sheriff's office and your law enforcement officials are going to present a case to you, now knowing what we got?

"Were you convicted of loitering?" counsel says is nothing. What is he doing loitering in a public toilet? What type of man do you think he is loitering in a public toilet soliciting a male, M-A-L-E, having a family crisis. He was having a family crisis out of the church. He wasn't preaching. I am not going to dignify the man as Reverend. If he wants to know about Reverends then let him come to Dr. Anders, Reverend Anders and Reverend Laseer. You meet Americans of his race who are men of God and not phonies and not this one with an F.B.I. record he doesn't remember but two of the four offenses. He sank in the seat when you looked at him. This is the type of recruit that CORE, C-O-R-E, Congree of Racial Equality, has to recruit to pay to come down.

Now, he brought this up. Let's talk about it. I see the distinction. I am going to be criticized all over the County for what I am about to say, but the difference between

NAACP and CORE is this: Counsel's view of all people know all this. You have been on record to know this. The NAACP does not advocate violence. CORE was formed because of the non-violent manner of NAACP and of the attempts to go in Court the NAACP will litigate their matters in Court. CORE, now, cannot say that. CORE solicits bums with moral records such as you have seen here today, and it takes more than putting
man
a collar on, saying a/is a God, a man of God who has been somewhere thrown out of his church on one occasion and the other occasion God knows what.

Who is he going to lead? Who is he going to save; the men he met in a public toilet? Who is he going to save; men he is trying to solicit. Come here and holler!. Give me the rights as an American Democrat! Protect me from these officers! When he, a British subject, doesn't think enough of your country and mine to even apply to become a citizen of this country. That is who stands up here today and I am going to talk about the facts of the case, but, counsellor, you are right. I am going into them because I intend to.

Now, let's just look. First, this man calls himself a Freedom Rider who came to Ocala, Florida for what? Testimony shows that these facilities had been integrated long before this man and that is all I can refer to him honestly, but I question that, too, before this man or the Defendant, before he ever came down here. He sets himself up; he, a man who possesses this F.B.I. record sets himself up as he is going to lead his cause down South.

Oh, he has got a lot to learn from the members of his race, here, in Marion County, Florida. Well, I will put in integrity and in honesty our negro citizens up against anyone in the world.

Let me tell you something. In the most publicized case that ever come out of this courtroom was the Reverend Dr. Anderson who said in his stand that there is one place that he knows of where there are better race relations and better people than in Marion County and that is heaven. That came from that stand.

Counsel says he was down there lovingly; he was down there peacefully. Counsel is from Jacksonville, Florida. Is time so short that he can't remember in his back yard, in his home town where they were fighting down-town in Hemming Park there where they were throwing gas bombs, both black and white at each other, and where they were shooting cars on the road. That is what counsel says we should allow the people to do before we stop it, or if counsel's memory is so short then I don't understand his position.

In Birmingham, Alabama, there, the police stood there and let them fight where in Ocala when it appeared, and I am ashamed that this thing happened in Ocala as well as you, but it appeared there might be some violence and the officer broke it up. They got to put the shoe on the other feet. We should not have broken it up. They haven't started fighting. Which one of you won't? You holler when they sit around and let them fight and when they break it up you condemn them.

Now, somewhere we have got to get in between this place and find out which way we are going. Now, he volunteered, he said, to come down here, you see; so the people had the congregation raise twenty-eight dollars for him. That got him and four other ministers from Albany, Schenectady, New York to Washington, D.C.

Now, he went through a training period. Training for what? You see, CORE, as counsel says, is one of many organizations. As such it must have finances to pay for his training and to pay him that expense money, and if these trips went peacefully all the way down here there is no publicity. CORE can't go and stomp its foot and say nobody is fighting our cause so they have to to have incidents. They have got to make incidents in order to advocate their own cause and raise money; so they train him from nine o'clock in the morning to five o'clock in the afternoon in Washington, so they go buy his ticket and say, "Here, take it."

This man leaves Washington on his way to St. Petersburg.

He eats at every cotton-pickin restaurant from Washington and all of a sudden he gets hungry here; no incidents here, or Gainesville thirty miles to the north or thirty-six miles. He ought to have been stuffed when he got here but, you see, no incidents; no incidents, no publicity. Oh boy, Ocala made it.

You turn on your television that night and that bias, bigoted Douglas Edwards giving Ocala a fit and that applies to his C.B.S. News. Pick up the paper and I was in New York after this incident happened. Oh boy, they carried their boys with them; their cameras to television; their writers. You should have read it. The New York Times could well learn and come down here and read the star banner Orlando sentiment and learn how to correctly report facts in the paper. They don't know they have got to sell and they sell from any bigoted misrepresented idea of slavery in the south.

Oh, the negro from Jackson in Jackson, Mississippi. They are freedom riders who left Chicago and finally got to Jackson. That negro got home. I would rather be in Jackson, Mississippi than be free on the streets of Chicago.

When this man got in Ocala testimony shows he wasn't by himself. Mr. Geiger says there were four groups; four in Ocala that day, both before him and after him. They ate nothing. They went where they wanted but, you see, no incidents, no cameras, no television. "Shute," they ought to come from Washington. St. Petersburg is the next stop down there. What did he say; something about a plane ticket waiting for him at St. Petersburg? This boy is into the road. They had to get it somewhere, so they were able to get it here, but I tell you this, and I mean this: You can put a collar on him; you can call him what you want, and the only thing you have got to do is live in Marion County to know this but, brother, I guarantee something, if you violate the law here it don't make any difference whether you are a freedom rider or camel rider you are going in. That applies to white as wel as colored and they, Owens and them knew it; to git and git, and if they didn't git they would have been here and they knew it and left. This is the big employee, this Bahamian or whatever he was asking for, British subject from Jamaica, something like that. I don't know, but they got the employe they wanted and they are comin to you and asking for sympathy.

All right, let's get the charge and talk about the charge. I suspect if you want to hear about the case you will hear about the case. You heard the other rambling. What are you charging him with? Unlawful assembly, and that is what we say on the 16th day of June, 1961 in the County of Marion in the State of Florida one, Leslie Lee Smith, did unlafully meet with two other persons, to wit, Herbert Ebenezer Calendar and

James Richard O'Connor, to commit a breach of the peace contrary to statutes of such case made and provided in the peace and State of Florida. That is it.

Okay, you heard James Richard O'Connor who first, the Reverend, I am going to be gracious, now, the Reverend said he is a professor of New York University of New York. Reverend, you got that a little wrong. Ain't that a little Bernard College school; a small school? Oh, yes, Bernard College, so the Reverend's memory returns, and we get back and so we get this professor up here. I refuse to answer on the grounds of the Fifth Amendment. I don't know, boy, that took the cake. Counsel advised him to do it. Counsel, let me tell you something. If you look at the Fifth Amendment it applies to the Federal Court and you have got to go to the Fourteenth to get to the State Court, and you got to the Fifth. Herbert Ebenezer Calendar, coached a little bit, refused on the Fifth. Go look at the book. The Fifth only goes to the Federal Court. You can't raise it. You have got to go to the Fourteenth Amendment.

He let in the Fifth so we let in the record we have to to prove these three came together. Officer Geiger testified you knew each other. He brings out O'Connor's name as a man who is bringing him into a place to eat. All three knew each other. All three came together. Now, here is where you have misquoted the law. The law is going to tell you what the law is. Let's get away from the Statute. You know the Court interprets Statutes because counsel of all people are acquainted with that.

By the way, schools do not appear in the United States Constitution but they say you can't segregate in schools, so that is where the Court interprets what the Constitution says and what the Statute says. Here is what the Court is going to read to you.

Unlawful assembly, which is the case here, has been defined as a gathering of persons of the required number, three, without a common intent, formed before or at any time during the meeting to obtain a purpose, lawful or unlawful, that is your key, that will interfere with the rights of others by committing disorderly acts in such a matter as to cause sane, firm and courageous persons in the neighborhood to apprehend the breach of the peace.

So let's look at the book. We have got O'Connor. The other boy's name I can't remember. Let me look at the book and see what his name was. Calendar, I think we have got them coming down together on the same bus. All right, put that as a union of one. Remember, this is the bus that parked in the bus station. This is the west door in which they went. Now, when they came in the bus and they stopped here lawfully, no question about it. They got off the bus station and walked in the west door; lawful, no question about it. When these three went through the west door as they met Owens, at that time when they began to shuffle or scuffle or have words and other people gathered around, boom, unlawful.

When the officers felt, and you did right, counsel, had reason to believe, based upon words that he heard at the time, based upon what the Defendant admits, that Owens says, "No nigger is going to come in here," he had reason to believe that violence or breach of the peace was being committed and then by the Defendant's own act of backing through that door, confirmed the suspicion of both the Sheriff Willis and Chief Deputy Geiger. He says to the whole group, disband.

Now, that law doesn't only apply to everybody and I see nothing in the book and I have looked last night, and I have looked today, to exclude freedom riders. There is nothing where it applies to freedom riders. I don't know where they get freedom riders. He better go back to Jamiaca before he hollers about freedom or get his American citizenship. He hollers about freedom rights.

At the point where they all gathered around there Chief Deputy Geiger said to disperse and they did, with the exception of one man and that was a white man named Penyel. He goes across the street and he sees these three aren't going to obey the officers. He comes back. What happens? Well, it looked like he got a little assistance that time but they got him back across that street.

Now, that dispersed order went to everybody, including this individual sitting here, including him but, no, we weren't going to have it. We are from CORE and we are going to make the newspaper and they picked your county and mine, knowing the embarrassment it would bring upon the officials of this state to get Ocala, Marion County.

Oh, I charge you this was deliberate. They were never going to do one thing in Ocala and that school in Washington, D. C. probably had them on the map of Ocala, Florida, but they weren't going to leave and Mr. Geiger said not once, not twice, but six times, at least, "Leave the premises and get back on your bus."

Now, listen, we have no question of integration or segregation here; none at all. Other people were eating in the cafeteria at the time. People ate before that morning and two groups ate afterwards. No trouble at all. We had one person. That is unlawful assembly and he intended to disperse it before we had any trouble.

No, but you see this man gets up and tells you, "I didn't know he was an officer," and in the manner in which he was treated. That officer in New York City, too, you know, the one that got him in the public toilet just coming back from work just happened to stop in there. Oh, the second time he just happened to be going in the toilet, but why did he plead guilty to those and serve thirty days for that, and here he has power and good counsel and all this. It doesn't add up, so you see there is a lot more on the horizon to write with your pencil. There is a lot more beyond the horizon you see here. He can violate the laws of New York and serve time. He admits two of them in the F.B.I. record; can't refresh his memory on the other two; serves two, but you see that officer up there in this great liberal democratic State of New York, New York City, real fine. They just yanked him out of the toilet and arrested him for going to the toilet. Guilty, he served thirty days. Counsel says that is not a crime. A felonly is the only crime. Man, either read the book or go back to school. That is the only crime.

Gentlemen, in conclusion, and you have heard enough ranting and racing from me because you might as well just rest and get back, and you are going to hear a sermon preached to you like you ain't never heard before and probably one never heard again, because counsel is going to rip from one end to the other every point in the argument. That is a fine thing and I mean that sincerely. You hired me. You have paid me. You have elected me to do one thing. That is to protect the rights of all citizens and should my office feel that there is sufficient evidence that a citizen has violated the laws of this state it is to ascertain the facts, bring this man to Court no matter what his name is or who he is and that has never interfered with me at all and I will say this: I don't think I ever will during my tenure of office have as much pressure brought on me by groups and organizations that is in this case when I can't run my office the way I think and somebody else takes this job, then, fellow, I am not going to run it any other way and they can have it.

I looked into this case. I checked the records in this case. I even reviewed the witnesses and the testimony in this case and I have done my job when I brought it to you. Now, your verdict certainly speaks the world over. This is the only incident that I know and I am aware of in all this freedom riders that there is a jury for counsel.

Counsel, check me if I am wrong. The first case they had trial by jury. You see, you can charge a crime being committed inside the city as counsel says. If you have a violation of a municipal ordinance for a crime while intoxicated you can be charged in the civil sense in the city and charged by the state. It is not one crime. It is two. You violate the State and you violate the City Ordinace.

There has been a fine cooperation of the Police Department and the Sheriff's Office, and if such a case warrants trial by jury we make every effort to see that the Defendant is granted a trial by Jury. That is the constitutional right. As counsel says you are given a trial by jury and the reason is obvious and the Supreme Court has affirmed that type of proceeding and I have submitted to you that and you have got one question in this case and one question alone. I think the big question in this case, either you uphold and apply the law equally to all people, or you don't.

You know, during the last few years as you people may have observed in court, the lawyer has nolle prosequied cases and moved to dismiss cases when he doesn't feel he has a case, and I venture to say this, and this you may take back to Albany, New York, too, that there are more cases than this case, and I will say without fear of contradiction and back the record up that have been dismissed against the negro race than against the white race, and I will tell you this and I want you to take this back to Albany, New York, in this year alone, I have prosecuted seven cases where a negro sat on that side of the bench without benefit of counsel and we have had an all-white jury and we got one conviction and six acquittals.

Equal rights do you think in Albany or in that master Court do you think he would get that there? You see, you have got a lot to learn. You create impressions and that is why I condemn the northern press as they are so eager to sell and reap economic gain. Oh, the purpose of the press by an act of information the people have long been lost by television and been lost by big northern papers. Lost, you see, he will go by and write a story I was extruding by E. G. Musleh. I don't mind if he just sends me part of it.

Gentlemen, I want to thank you and a bag of wind sometimes gets and counsel says this case has drawn world-wide attention. I don't get paid a cotton-pickin dime extra no more than you do. I have got one hundred and one cases to be tried here and already ninety-one in September Term of Court. If it takes me to be here until midnight I am not going to be derelict in my duty. When they come through that door they are all alike and I don't see any special privilege being given to anybody when they come in this courtroom and nobody is going to be taken advantage of, and I can say that thank God we have a court here and write this down, too, and take it back to New York.

Why I have seen this Court lean over backwards to protect the rights of the Defendants. I have been admonished more by this Court. When the Defendant doesn't have an attorney and it just seems to go a little off the track, hold him, back up. You are right. So I can proudly say, and take this back with you. You will be back down hear you will learn something. We have a great judicial center in Marion County and I don't care whether it is Ernest Jackson or Leslie Smith, but they are going to be given every courtesy when they get into the door and get to trial, and I hope you don't think anything about our outbursts. He is a good lawyer. I have respect for a good lawyer and you will see lawyers fighting and won't speak to each other in the courtroom and when they get out of the courtroom they are friendly. I want to thank you and I am sorry it has gone such as the hour that it is.

(Mrs. Jackson makes his final closing argument)

(Court delivers its charge to the Jury)

(Jury retires to consider their verdict at 10:00 P.M.)

(Jury returns with their verdict at 10:28 P.M.)

COURT: Gentlemen of the Jury, have you arrived at a verdict?

FOREMAN: Yes, Your Honor.

COURT: All right, would you hand it to the Bailiff? We, the Jury, find the Defendant, Leslie Lee Smith, Guilty as charged, so say we all. M. E. Dean, Foreman.

(And thus the trial ended.)

CERTIFICATE

STATE OF FLORIDA
ss
COUNTY OF DUVAL

I hereby certify that the foregoing transcript is a true and correct transcription of my stenotype notes taken at the indicated time and place.

/s/ Laurence Wolin
Laurence Wolin, Official
Deputy Court Reporter.

Mss 546 SEDFRE

Callander et al vs Florida, July, 1961 - March, 1966 (Con'T)

(Leslie Lee Smith transcript of Record)

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FIRST DISTRICT

JAMES RICHARD O'CONNOR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

TRANSCRIPT OF TESTIMONY

VOLUME II

PETITION FOR WRIT OF CERTIORARI

TO: THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND FOR MARION COUNTY, FLORIDA

Ernest D. Jackson, Sr.
410 Broad Street, Suite 206
Jacksonville, Florida

For Petitioner.

Hon. Richard W. Ervin, Esq.
Attorney General
State of Florida
Tallahassee, Florida

For Respondent.

IN THE COUNTY JUDGE'S COURT, IN AND
FOR MARION COUNTY, FLORIDA.

CASE NUMBER:

STATE OF FLORIDA,)
)
Plaintiff,)
)
VS.)
)
JAMES RICHARD O'CONNOR,)
)
Defendant.)

TRANSCRIPT OF TESTIMONY OF TRIAL

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You gentlemen may now retire.

MR. MUSLEH: Will counsel now stipulate that the Jury can retire to their respective homes under the direction of the Court without being kept together under the custody of the Baliff during the night?

MR. JACKSON: I agree. . . Your Honor, the only other instruction I would like for Your Honor to give to the Jury is that anyone should contact them to inform the Baliff or the Court immediately.

THE COURT: If anyone should contact you regarding this trial, the Court would ask you to notify the Court or the Baliff of such facts. . . All right, gentlemen, you may now retire through the side door there and return in the morning at 10:00.

SECOND DAY OF TRIAL - JULY 7, 1961

WHEREUPON, Court convened at 10:15 A.M., and the Jury was present in the box, and the following proceedings were had and testimony produced:

WHEREUPON, at the request of Defense counsel, the witnesses were placed under the rule by the Court and excluded from the Court Room at 10:20 A.M..

WHEREUPON, the State called to the stand as their first witness, MR. H.A. GEIGER, who having been sworn by the Court according to law and testified as follows:

DIRECT EXAMINATION BY MR. MUSLEH:

Q. State your name, please?

A. H.A. Geiger.

Q. Your profession or occupation?

A. Deputy Sheriff, Marion County, Florida

Q. Do you hold any official capacity with the Sheriff's office of Marion County?

A. Chief Deputy.

Q. How long have you been so employed?

A. Since January 3rd, 1961.

Q. Prior to that time, have you had any law enforcement experience?

A. Yes, sir.

Q. Will you state to the Court now, what experience you have had?

A. I was with the Ocala Police Department for approximately five years with the rank of Detective Captain.

Q. Your duties as Chief Deputy with the Shefiff's office consist of what?

A. Assignment of the officers and review the cases, and other official law enforcement work.

Q. Now, were you so employed on or about the 16th day of June, 1961?

A. I was sir.

Q. On that date, did you see the Defendant here, James Richard O'Connor?

A. I did sir.

Q. Are you accquainted with Herbert Ebenezer Callender?

A. Yes sir.

Q. Did you see one Herbert Ebenezer Callender on the 16th of June, 1961?

A. I did sir.

Q. Do you know or accquainted with one Leslie Lee Smith?

A. Yes sir.

Q. Did you see that Defendant on the 16th of June--- Leslie Lee Smith on the 16th of June, 1961?

A. Yes sir.

Q. Will you state to the Jury where you saw the Defendant, James Richard O'Connor?

A. At the Ocala Bus Station was the first place I seen him.

Q. Will you state to the Jury under what circumstances that you saw him at the Ocala Bus Station?

approximately three or four feet inside the West door of the bus station, and when I say inside, they were inside the area where the ticket desk is.

Q. Before we go any further, let me ask you . . . were you at the bus station?

A. I was.

Q. Why were you at the bus station?

A. We had advanced notice of what time the buses were arriving, coming into Ocala with freedom riders. We were there to prevent any trouble sir.

Q. Did you assign other men there other than yourself?

A. Yes sir.

Q. Now, at the time that the Defendant, James Richard O'Connor, at the time you said you saw him there, had a bus full of freedom riders already been to the bus station and parted?

A. Yes sir, earlier in the day.

Q. Was there any incident at that time?

A. No sir.

Q. Do you know of your own knowledge whether they knew and used the facilities of the bus station?

A. Yes sir.

Q. That is the first group used the facilities?

A. I did not see them use them.

Q. You did not see them use them?

A. No sir.

Q. Now, let's continue now, what was happening, what was the Defendant doing at the time you saw him at the bus station . . . First, let's establish about what time that was?

A. Approximately 12:30.

Q. 12:30 in the noon hour?

A. 12:30 P.M., June 16th.

Q. Will you go ahead and state to the Jury now what was happening when you saw him?

A. A. It was he and three other people, or he and five other persons just inside the bus station. First, what attracted my attention to this group were loud words.

Q. Such as --- Do you remember any of the words, loud words, that you heard that attracted your attention to the group?

A. No sir I don't.

Q. All right, proceed.

A. I proceeded over to the group and on the way I seen the Defendant, O'Connor, another person later identified to me as being Owens, shoving each other. When I arrived, I did identify myself. I asked them what the trouble was and Owens said that another person in the group had stepped on his foot.

Q. Now, let's stop right there. You saw the Defendant here and Owens shoving each other, is that correct?

A. That's correct.

Q. Now, will you demonstrate to the Jury here by using me the manner that you saw those two shoving . . .
Will you come out here and demonstrate that to the Jury?
(The witness demonstrating)

A. It was something like this. Both of them had their hands up and I believe O'Connor's was underneath Owen's arm, like this.

Q. O'Connor was in actual physicall, or he touched physically Owens?

A. Yes sir.

Q. And they were pushing each other?

A. Yes sir.

Q. At that particular time, did you see present with O'Connor this Herbert Ebenezer Callender and Leslie Lee Smith?

A. Yes sir.

Q. All right, proceed to tell us now what happened?

A. I identified myself as I stated told them to come outside, we would straighten this problem out.

Q. Who did you tell to go outside?

A. The entire group.

Q. Who was the entire group?

A. There was O'Connor, Callender, Smith, Penuel, Windsor and Owens.

Q. Did you identify the latter three, Penuel, Windsor and Owens as to their place of residence?

A. Later, yes sir.

Q. Where was their place of residence?

A. Marion County, Florida.

Q. All right, what happened when you told them to go outside?

A. Well, I had to ask them several times. O'Connor appeared to be the spokesman for the group. He insisted that he was a I.C.C. passenger and he was going in to eat. They had just arrived on the bus, they wanted to eat.

Q. Right there, they had just arrived on the bus, O'Connor, Callender and Smith?

A. Yes sir.

Q. Proceed.

A. After I asked them a few times till I got them outside the door, I started to go up there to talk to them, and I told them we wanted no trouble whatsoever. I advised Owens, Windsor and Penuel to leave the bus station area entirely, all together. I advised Smith, Callender and O'Connor to get back on the bus and remain there until it left Ocala.

Q. Now, just getting back now to this incident when you first saw it, what was Callender and Smith doing at the time you saw the Defendant, O'Connor shoving; what were they doing?

A. They were standing parallel to him. Smith was directly to the right of O'Connor and Callender was to the right of Smith.

Q. Now, did you hear --- was there any exchange of words between the three you testified to, or any other persons and O'Connor, or Callender, or Smith?

A. I know Callender exchanged words with Owen and Smith made some comment to Owens.

Q. What did you hear Callender say to Owens and vice versa?

A. I couldn't recall the exact words.

Q. Were the exchange of words in a threatening or angry manner?

A. Yes sir.

Q. Now, will you got this group outside and you ordered, did you order all six to disburse?

A. Yes sir.

Q. What did Owens, Penuel and Windsor do when you ordered them to disburse, those three now?

A. They left the area.

Q. Did one of them later return to the area?

A. Yes sir.

Q. Which one returned?

A. Penuel returned.

Q. What happened when Penuel returned to the area?

A. He was advised again to leave, and an officer went with him across the street to his car.

Q. An officer then escourted Penuel off the bus station premises to his car, is that correct?

A. Yes sir.

Q. At the time Penuel returned, was O'Connor, Callender and Smith still there at the bus station in front of you?

A. Yes sir.

Q. Now, what did you do then?

MR. JACKSON: Your Honor, I would like to make an objection and I would like to make my objection outside of the Jury.

THE COURT: You gentlemen may retire to your Jury Room.

WHEREUPON, the Jury was execused from the Court Room.

MR. JACKSON: Your Honor, I'm objecting that this witness is about to say that these Defendants refused ---

THE COURT: Well, let's see, let him answer it out of the presence of the Jury to see what he is going to say.

MR. JACKSON: All right.

THE COURT: Go ahead and answer the question.

MR. MUSLEH: (Continuing)

Q. What did you do then?

A. After Penuel left, I again instructed these men if they didn't get on the bus that they would be placed under arrest.

Q. All right now, how many times did you ask these men referring to O'Connor, Callender and Smith to get on the bus before you mentioned arrest?

A. At least three times before I mentioned arrest and at least three times after I told them they would be arrested.

Q. A total of six times?

A. Yes.

THE COURT: Do you still object, counselor?

MR. JACKSON: object Your Honor on the grounds that this charge of unlawful assembly and apparently the evidence that is about to be introduced from this witness is not in conneetion with unlawful assembly, but is in connection with a refusal to obey an officer. It is the position of the Defendant that that testimony is irrelevant and prejudical and should for that reason not be admissible at this time in this particular trial relative to the charge of unlawful assembly. I point out to the Court, if I may that unlawful assembly does not carry with it an element or feeling to refuse to obey an officer. The assembly carries with it the notion of a crowd milling, getting together, and the evidence about to be induced from this witness is irrelevant and not a part of the charge of the alleged crime of unlawful assembly. Now, Your Honor, if evidence is irrelevant and yet it is prejudicial in that it attempts to press upon the Defendant additional burdens, then that irrelevant evidence certainly should not be permitted to go before the Jury. I realize that under some circumstances that evidence may be permitted to go before the Jury, but where it is wholly irrelevant, I say here it is as to the charge, then it should not be permitted to go before the Jury.

MR. MUSLEH: If the Court please, unlawful assembly, the best definition we can obtain from American Jurisprudence and which the Court is using to instruct, pursuant of three or more persons in a gathering, although the gathering may be lawful, then the circumstances from that point are as to the fear, violence and so forth in a prudent man. Now, I have --- Now, we have a follower there, if you follow on the assembly towards the notion that we get into a rope, and from the rope into the physical contact and then to a riot. Now, Your Honor, this testimony is material, because of Penuel's return to the station while the Defendant and his two companions had still refused to leave. The unlawful assembly covers the entire meeting, its purpose. We can show and we have to show what his intent was, the purpose, though they were lawful at the time became unlawful --- the only testimony as to any evidence of their lawful acts becoming unlawful is material to this cause. I don't see where you are going to draw your knife and count the officers and disect the two. We can follow this act and then cut it off.

MR. JACKSON: Your Honor, if I may rise again as a result of the statement by counsel made, I would like to, if I may direct the Court's attention, if you please to a definition of unlawful assembly. Now, of course, Your Honor, the definition means individuals who have voluntarily met for the purpose of carrying out a common purpose and who act themselves in such a disturbing way as to disturb the peace. Now, I realize that counselor is having difficulty in trying to prove the action of these individuals as distrubing the peace. I submit to the Court that the officers requested them to move. It's not a part of unlawful assembly. The officers requested them to leave the scene or the area. It's not a part of the charge of unlawful assembly, if they were unlawfully assembled. They were unlawfully assembled prior to the time. It was unlawful after that to remove and consquently we say this part of the testimony is irrelevant to the charge and yet if Your Honor will permit it to go in, it will create additional burden on the Defendant to defend himself, and he has a right to be charged and tried for the charge made against him, not against another charge. To throw them together, sir, will certainly impose upon him a merger of defenses, which he should not have to undergo.

MR. MUSLEH: The fine line of counsel that he is trying to draw by his objection is when was there an unlawful assembly, at what act was there a lawful, or unlawful assembly? Remember the definition before the Court unlawful assembly results in the breach of peace. Now, when was the peace breached? Was the peace breached when they refused to go? You see, Your Honor, we can't say it was unlawful assembly there when he put it in fear, it was unlawful assembly as long as they continued to assemble and be unlawful, and all those acts are material and we can't disect them in the manner that counsel is now objecting to.

MR. JACKSON: Your Honor, I don't intend to be continually rising to rebut the argument of counsel, but I agree with him sir when he said that I am trying to get the Court to disect this matter into its proper parts, because I think that is what we are here to do.

MR. MUSLEH: I didn't say proper parts.

MR. JACKSON: I'm sorry . . . What I mean Your Honor, is that, first of all, we have an unlawful assembly. We have the people acting on their own, volunteers. Now, when the police inject themselves in to this, this no longer becomes a voluntary act conclusively within themselves, but it is arguments with the breaking in to of this officer. Now, the part I am getting to was that the saying to the officers, that was the first instance of breach of peace, if that be so, then the definition of unlawful assembly has certainly nothing or not been complied with, because it says unlawfully assembled with the intentions of doing acts, in fact, breach of peace. The definition is given here.

MR. MUSLEH: Let's read that definition.

MR. JACKSON: All right. Unlawful assembly as being defined as a gathering of persons of required number without a common intent formed before or at anytime during the meeting.

THE COURT: Isn't that with a common intent?

MR. JACKSON: No sir, without --- For a common meeting --- Now, where was the meeting? Now, the common meeting Your Honor, during the meeting. All right, now, the meeting is the thing that this particular Statute is dealing with, their meeting to attain a purpose, lawful or unlawful, which will interfere with the rights of others. Now, Your Honor, by committing disorderly acts in such a manner as to cause sane, firm and courageous persons in the neighborhood to appear to apprehend a breach of peace. Now, Your Honor, it has to be this meeting, this voluntary meeting it must be the conduct that was exhibited by them in this meeting that must give rise to putting fear in someone that there would be a breach of peace. When the officer arrived, his only interest there is not a part of that meeting, his orders were for them to move. Now, he said, he went in, because there is a legal meeting. Now, the only thing we can talk about Your Honor is the conduct of the parties before the officer arrived and the part of him saying, "I told you to move," that is not a part of the charge, and therefore should not be made a part of this argument. I tried to get counsel to combine both charges and counsel disagreed. I don't see that, to try him with the evidence that he refused to obey the officer in this case and try him again in the next case certainly would be double jeopardy, because he is being tried for two offenses.

MR. MUSLEH: First thing, counsel, you don't know that I will try the second case to start with, but let me say this point in argument. Your Honor, the definition which he read is the one I referred to, the meeting thus lawful that will constitute a breach of peace is those three stayed together and did not disburse in the same meeting. The officer still had the fear that their meeting and remaining there would result in a breach of the peace as the testimony has been induced here that the one of the three men, who he removed from the premises returned when he saw the three were still there, so it was essential that they be disbursed, they were still in the same meeting. Now, you can't say that this meeting stopped, because the meeting was a continuance affair and the possibility of the breach of peace was a continuance also.

THE COURT: The Court feels it is a part of the res gestae and will deny the objection and will allow the evidence in for that purpose of intent only, so if counsel will restrain himself only to bringing out --- not bordering over into failure to obey the police officer charge. As you elicit your information, do not ask questions which would border over on the failute to obey a police officer, but restrain yourself to bringing out the purpose only.

MR. MUSLEH: I'm trying to clarify in my mind the Court's ruling and I will not go beyond what the Court rules. The Court is ruling that this testimony is admissible as part of the res gestae.

THE COURT: To show the purpose, the intent.

WHEREUPON, the Jury was returned to the Court Room.

MR. MUSLEH: (Continuing)

Q. All right, do you know what the question was?

A. Yes.

Q. May be, we had better have the question read to the Jury, so they will know just where at the time when they left we were.

REPORTER: The question was, what did you do then?

MR. MUSLEH: All right, pick up from that point there.

A. I ordered Penuel to leave and he was escorted across the street.

Q. Penuel?

A. Yes sir.

Q. All right, now, then, was O'Connor, Callender, Smith, still together?

A. Yes sir.

Q. Where were they at together?

A. They were just outside at the West entrance, the ticket office at the bus station.

Q. Now, let me ask you this . . .

(Attorney drawing on the black board)

Q. Assuming this is the West side of the bus station, this direction here, where did the bus park, which the Defendants came in that day, which side of the bus station?

A. On the West side.

Q. On the West side . . . Now, you say they entered through the West door?

A. Yes sir.

Q. Now, at the time you saw O'Connor, Smith and Callender, where were they at in reference to the West door . . . Now, let's get the inside of this building . . . Is there a bagage rack on the left as you go in?

A. Yes sir.

Q. Is there then a ticket counter?

A. Yes sir.

Q. Is there a cafeteria on the East end?

A. Yes sir.

Q. Where were they at in reference to the West door, that is this gathering which you saw when you first went over there?

A. When I first went in, they were approximately three feet inside the door.

Q. Inside the door into the building area . . Now, how far were they ever in the building at the time you saw them?

A. Approximately three or four feet.

Q. Then, is that when you moved them outside the building?

A. Yes.

Q. Mr. Geiger, were there other people other than the six you testified to in the bus station gathered around in a crowd?

A. Yes sir.

Q. Approximately how many people in all gathered around this crowd here in this commotion that you testified to at anyone time?

A. Well, there was six in the commotion itself and there was at least twenty-five people inside the waiting room there.

Q. Did you order all people --- This is the waiting room area, is it not?

A. Yes.

Q. Did you order all people to disburse?

A. I ordered these six outside.

Q. The West door?

A. Yes sir. . . I left another officer inside to see there was no more trouble inside there.

Q. Do you know at that time whether there was any group, persons, individuals of these freedom riders of your own knowledge, any in the cafeteria?

A. I know that at least two freedom riders had already passed me and entered the cafeteria. After the arrest was made on these, I observed these two inside the cafeteria sitting at a table together.

Q. Did you or any other officer down there under your own command, or any other officer that was not under your own command interfere with the other two that entered the cafeteria and sat at the table?

A. No sir.

Q. Were there any subsquent group of freedom riders in the bus station that day?

A. Yes sir.

Q. How many more?

A. Well, there was one group that came in the bus station, left, but remained in Ocala, returned to the bus station, and then there was one other group that came in, remained there a few minutes and left.

Q. Did these groups best of your knowledge use the facilities of the bus station without interference from anybody?

A. I seen them use the water fountain, the ladies' rest rooms and the restaurant.

Q. These people who used this, was it both colored and white?

A. Yes sir.

Q. And there was no interference from any of the officers?

A. No sir.

Q. The only commotion that took place on that date was that involving the three that you have testified here to date?

A. Yes sir.

Q. Now, at the time you saw this gathering of six, did you have any reason, apprehension or any fear of any possible rout, riot or any physical disturbance of the peace in any manner?

A. Yes sir.

Q. What do you base that on?

A. Prior to the arrival of this bus, I received information that some man had been down previously making a statement that no more damn niggers would have, would eat here today. There was one man that was there talking that I advised to leave. I knew the man, he left, prior to the arrival of the bus.

Q. He was talking in an angry manner?

A. Yes sir.

Q. And you ordered him to leave?

A. Yes sir.

Q. He left?

A. He left.

Q. Go ahead. . . What other reason, if any that you had any apprehension or fear that this possible commotion would result in any breach of the peace?

A. Because of the feelings of some of the people that were in the area, the atmosphere of that particular day, that time, and the fact that we did not want any violence here. We did not want to have to make any arrests. We wanted no trouble whatsoever with the entire group. That was the only reason that we were there to prevent anyone from being harmed in anyway whatsoever in Ocala.

Q. All right, to get back to the actual commotion, itself . . . You say O'Connor was pushing or had his arms in some manner on Owens?

A. Yes sir.

Q. Owens likewise on O'Connor?

A. Yes sir.

Q. Now, did Callender have his arms on anyone, or did anyone have their arms on Callender?

A. Not that I seen, no sir.

Q. Callander was to the right of O'Connor, is that correct?

A. Smith was directly right and then Callender to the right of Smith.

Q. This group that had gathered there, did they encircle O'Connor, Callender and Smith?

A. No sir, they were facing them.

Q. Assuming this is the West door here, they were all facing in this manner, is that right?

A. That's right.

Q. Were they in between the door area and the cafeteria area . . . You know where the West door comes in, were they in between the cafeteria area?

A. Well ---

Q. Did you understand my question . . . Were these people's backs to the cafeteria area?

A. Penuel, Windsor and Owens was, or their back was to the cafeteria. Callender, Smith and O'Connor's back was towards the West door.

Q. How about the other people who had gathered around; which way were they facing?

A. The majority of those were South of me to my left.

Q. Which area would that be, would that be this area of the building?

A. Yes sir.

Q. Were they facing the direction of these six people that you have testified to?

A. Yes.

Q. Did you have any words with O'Connor, was there any conversation at all between you and O'Connor?

A. Yes sir.

Q. Will you relate the nature of that conversation?

A. O'Connor did most of the speaking for the group of freedom riders.

MR. JACKSON: I want to object to the group of freedom riders. I think that in fairness to Geiger, he may say that he was the one speaking at that time . . . Would you say that?

MR. MUSLEH: I think his objection is well taken.

MR. MUSLEH: (Continuing)

Q. You tell me what O'Connor said . . . You can't say who he represents, but what did he say?

A. O'Connor's statements to me were that he was an I.C.C. passenger. He had just arrived on the bus. They were hungry, he said, we are hungry, we want to go in and eat.

Q. All right, what else?

A. My comments to him were, that we didn't want any violence here, I wanted him to go outside, we wanted to stop this difficulty. Once outside, his comments were the same, mine were that he would have to retire to the bus, remain there until they left Ocala.

Q. Are you accquainted with a Doctor Stearn from New York and a Benny Weston from New York?

A. I couldn't say that . . . I know Doctor Stearn just from sight, but I haven't talked with him.

Q. Now, did you see him and Benny Weston at the bus station at the same time that you saw O'Connor?

A. No sir I didn't.

Q. You did not?

A. No sir.

Q. Can you identify at all these two people, these two freedom riders who went in and used the facilities of the bus station even after the arrest of O'Connor, Smith and Callender?

A. One being a colored female and one white female.

Q. They used the facilities after this?

A. Yes.

Q. Was there any obstruction at that time of them using the facilities?

A. Of them using, no.

Q. In order for O'Connor, callender and Smith to have used the cafeteria, would they have had to gone through, around, or pushed through this crowd of white people, who had gathered there?

A. I assume so.

Q. There was actual shoving involved at the time you saw them, between he and Owens?

A. Yes sir.

MR. MUSLEH: You may inquire.

CROSS EXAMINATION BY MR. JACKSON:

Q. Officer Geiger, I believe that you testified day before yesterday ---

MR. MUSLEH: Hold it just a minute . . . I object to any questions about any testimony given in a prior case.

MR. JACKSON: May it please the Court, I was trying ---

MR. MUSLEH: Let's let the Jury go outside.

WHEREUPON, the Jury was excused from the Court Room.

THE COURT: Before we begin arguing, the Court at this time feels there has been no proper predicate laid for any introduction of previous testimony by any witness.

MR. JACKSON: Now, Your Honor, that is why I was asking. I think the predicate would be laid by directing the witness'es attention to a prior statement and planning to give him the benefit upon answering that.

MR. MUSLEH: Your Honor, if he wants to do that, he has a right now in the absence of the Jury to lay his predicate and ask his questions now, and the State will make its objection and the Court can rule on it.

MR. JACKSON: (Continuing)

Q. Mr. Geiger, do you recall my asking you whether or not you could identify the people who were in the group at the time you got up and walked over there to them . . . You remember me asking you that question?

MR. MUSLEH: Can you identify that as to time?

MR. JACKSON: (Continuing)

Q. That was Wednesday.

A. Could I identify them at the time I walked over there?

Q. That's correct.

A. If you did, the answer would have been no, because I didn't know all of them at that time.

Q. Do you recall me asking you the people that you could identify in that group, and your statement to me was, "I saw Smith and O'Connor." Those were the people that you said you identified.

A. I think you are in error there.

Q. You don't recall saying that?

A. No sir.

Q. Did you say anything about seeing Callender inside of the building?

A. Yes, several times.

Q. And that was your testimony of who was there?

A. That's right.

Q. I ask you this, do you recall talking to Callender a fellow that had a camera?

A. Yes sir.

Q. Where did you see him with the camera?

A. I seen him inside the bus station and outside, and at the jail. In fact, I was the one that gave him the camera back when he posted his bond when he was released.

MR. JACKSON: Now, Your Honor, do we have the record here?

MR. MUSLEH: We don't even have the Court Reporter here that has that record. I expect it is for the purpose of impeachment.

(Discussion off record)

WHEREUPON, the Jury was returned to the Court Room.

THE COURT: You may proceed.

MR. JACKSON: (Continuing)

Q. Officer Geiger, you said when you looked up, you saw the crowd at the entrance of the door of the terminal?

A. Just inside the door.

Q. Just inside the door . . . Would you be kind enough to tell the Court where you were at that time in the particular area?

A. I was standing approximately fifteen or twenty feet.

MR. MUSLEH: Show him on the board, please.

A. I assume this is the door . . . I was approximately here.

Q. Now, will you tell the Jury and the Court just about where these other people were . . . I'm not talking about the six men . . . I'm talking about the other people that were in the bus terminal, about where they were?

A. There is a double bench right along in here, I assume six or eight feet . . . There was four or five people here, four or five here right along the side of the wall next to the entrance to the cafeteria in this area.

Q. Now, did you hear anyone say anything in those group of people?

A. I heard comments all day, they attracted my attention. That is where I primarily focused my attention and I proceeded to them. I heard comments prior to that time and after that time.

Q. You mean from the people that were inside the building?

A. Yes, inside.

Q. Now, Officer Geiger, you said that when you noticed the Defendant here, that he had his hands, I believe the demonstration was just under Mr. Owens' arm, and that Mr. Owens had his hand kindly on the chest area of the shoulder of Mr. O'Connor, is that right?

A. In the chest area.

Q. Chest area . . . Now, what was happening to the right hand, do you recall?

A. I don't know what was happening with his right hand, because it was obstructed from my view, but Owens had both hands on him. You see, his back was to me and I could tell about him, but I could not tell about and see O'Connor's right arm.

Q. Now, you told the Jury you had heard some loud talking, but you don't know what was said?

A. I can't recall the exact words.

Q. The language?

A. The most violent language, it was the loudest language and most angry language was coming from Owens.

Q. In other words, you didn't hear the Defendant here curse Mr. Owens or anything of that sort?

A. I didn't hear either one of them curse.

Q. There was no profane language used?

A. No profanity used, that I heard.

Q. In other words, when you said loud, you have reference to volume, in other words, rather than speaking in a whisper?

A. Other than the normal tone was loud.

Q. But it was not loud enough for you to hear what they were saying when you were standing some fifteen feet away, is that right?

A. It was loud of course for me to hear, at the particular time and under the circumstances, I didn't make notes on it, and to be truthful, I can't swear exactly what they said.

Q. I don't want to have you swear, if you don't know .. You can't remember, I think we will accept that . . . My next question sir, now, you said you told the Defendant to move outside, and if I am absolutely correct, I realize that you said that you asked them to disburse two or three times and then eventually they did come outside of the waiting room, is that correct?

A. Yes sir.

Q. In other words, when you showed up, no one attempted to start swinging at anybody, did they?

A. After I got there, no, because I attempted to separate them and stop them.

Q. Now, where are you charging that the Defendant was committing an Unlawful Assembly . . . Are you saying that they were unlawful assembled when you looked up and saw them standing inside of the room, or when they were outside of the bus terminal?

A. I'm saying the breach of peace was first committed when I seen them inside, seen the shuffle and the loud voice talking. As I stated before, we didn't want to make any arrests at all.

Q. I understand that .

A. And the breach of peace continued on through the time they were placed under arrest, the attempt by Callender to photograph me until they were placed in the car and removed from the scene.

Q. In other words, you said they were unlawfully assembled when they were inside the bus terminal, when they came outside the bus terminal and until you put them in the car, isthat correct?

A. That's correct.

Q. Now, isn't it true when they came outside of the bus terminal, they were there, because you had asked them to remove to there, isn't that true?

A. That's true.

Q. Then, they weren't voluntarily standing there, were they?

A. I wasn't holding them, I had asked them out, but if you recall, outside the bus station when this offense occurred, we had approximately half a dozen officers that kept everyone outside the areas away from this area all together.

Q. What I was asking you sir was this, the fact that when they moved outside of the door, they were there, because you had ordered them there, isn't that true?

A. At that particular time, I had asked them out.

Q. I'm sorry, you had asked them out?

A. That's right.

Q. Isn't it also true that the Defendant here told you that he was an I.C.C. passenger and that he told you that he had been on the bus and that he wanted to go inside and eat, is that correct?

A. That's correct.

Q. He told you this?

A. True.

Q. You didn't permit him to go inside and eat, did you?

A. Under the circumstances, I couldn't permit any of them to go in.

Q. My question basically, you didn't permit him to go in?

A. I did not.

Q. He wanted to go, did he not?

A. He stated that he did.

Q. And the only reason that he didn't go apparently was because you told him no, is that right?

A. Sure.

Q. You made another statement a moment ago, Callender attempted to photograph you?

A. Callender, yes.

Q. Do you know where he was standing when he took the photograph?

A. I do.

Q. About where was he standing?

A. He was outside the bus station after I told them they were under arrest and advised one of my men to bring the car up and get them. He put the camera up to his eye and I took the camera away from him, give it to the officer that transported them to jail and gave him a receipt for it when he was put in jail. When he was released, I personally handed him the camera.

Q. You did not see Callender standing out there in this area, standing out here when you advised O'Connor, and Reverend Smith to move out . . . You didn't see him standing out here? (Attorney pointing to the black board)

A. He wasn't out there, he was inside.

Q. Now, Mr. Geiger, you said that at the very time that this was going on, that is when you were asking the Defendants or the Defendant O'Connor to move outside of the terminal, you said that some of the passengers were actually inside of the cafeteria area and that they were actually using the cafeteria, is that your testimony?

A. At the time the instance occurred, two had passed me and entered the door into the cafeteria. I did not see them while I was talking to these. After the Defendant had left the bus station, gone to the jail, I returned to the cafeteria, I seen a white female and a colored female, who were eating, or drinking something, they had a glass in front of them sitting at a table together.

Q. In other words, I think I understand you . . . You were here in the station, but you were not there attempting to refuse anybody from using the facilities?

A. That's correct.

Q. In other words, it is your testimony that you recognize the fact that these people were on the bus stopping there and they had a right to go in and use the facilities, and that you were there to prevent anyone from stopping them from using them in anyway, is that right?

A. That's true.

Q. And that was your purpose for being there?

A. The purpose was to see that no one was harmed inside.

Q. I understand . . . Now, your instructions to O'Connor the Defendant there was to, if I recall correctly, and if I'm wrong, don't hesitate to say you're wrong, because I want you t you to tell me I'm wrong was to get back on the bus, is that right, when they were on the outside here, you told O'Connor to get back on the bus, is that right?

A. That s true.

MR. JACKSON: That's all.

REDIRECT EXAMINATION BY MR. MUSLEH:

Q. Let me ask you just a couple of questions . . . Your purpose at the bus station was as you say to see that no one intereferred with no one else, and no violence for breach of the peace would be committed, is that right, sir?

A. That's true.

Q. And they were all the groups that went in the bus station that day, this is the only instance that even had a tendancy towards the breach of the peace, is that correct, sir?

A. That's true.

Q. At the time that you had the three here, Callender, Smith and O'Connor outside here, there were still people inside the bus station, is that right?

A. Yes sir.

Q. The three that you had disbursed from the premises when they were in the vicinity of the bus station, or were they in the vicinity, or do you know?

A. I know one was across the street.

Q. Now, the bus station is on the corner of Monroe Street, is it not?

A. Yes sir.

Q. And it fronts Magnolia Street?

A. Yes sir.

Q. Where was this person at in reference still within sight of the Defendant and you?

A. He was still in sight of me.

Q. Where was he at?

A. Penuel the first time was in front of the Max Tavern.

Q. Max Tavern is on Monroe Street facing North facing the bus station?

A. Yes sir.

Q. Penuel was in this area here?

A. Yes sir.

Q. Penuel, was there any obstructions from his view to where the bus view where the Defendants were?

A. No.

Q. All right, did you see anyone else, the three you disbursed other than Penuel that was still standing there watching the proceedings?

A. Well, all three of them for a brief time. By the time that I had arrested these three and removed them, then the only one that was still there was Penuel and he was sitting in a car.

Q. Is Penuel the same person who walked back to the station, the same person that you had the officer escort back across that street?

A. Yes sir.

Q. Now, when he walked back to the station, at the time he walked back to the station now, the three Defendants, or this Defendant here, and Callender and Smith, and you were still there and you were trying to pursuade them to get back in the bus?

A. There was Callender, Smith, O'Connor and myself, yes sir.

MR. MUSLEH: That's all.

RECROSS EXAMINATION BY MR. JACKSON:

Q. Mr. Geiger, I think you said Mr. Penuel was over here across the street?

A. Yes.

Q. What happened to the group of people that were inside of the station?

A. I don't know, I had officers in there and I know when I returned everything was back to normal inside.

Q. Now Officer Geiger, I am positive, perhaps, I am in error, but I believe you had a chance and an opportunity to observe two men actually fighting, haven't you?

A. Yes sir.

Q. And now, you have in some instances arrested both persons that were fighting and sometimes arrested only one of them of the two that were fighting, have you not?

A. That's true.

Q. So it was no intention to arrest these six men while they were standing inside of this terminal, is that your statement? Would that be correct?

A. No ---

Q. I said, you had no intention of arresting the six men when they were standing inside of the terminal and you told them to move out?

A. I didn't want to arrest any of the six.

Q. And you did not arrest them, this Defendant, because he was standing inside of the terminal with Mr. Owens, did you?

A. No sir.

Q. Because you let Mr. Owens go, didn't you, and you let the other two gentlemen there go to, and naturally you were treating this Defendant with the same courtesy and respect as you were treating the others, isn't that correct?

A. That's true.

Q. At that stage?

A. I treated all of them exactly alike.

Q. Now, isn't it true the only reason that you arrested this Defendant was because he did not get back on that bus?

MR. MUSLEH: Just a minute, to which the State objects, the reason for the arrest is immaterial. The acts committed as the basis for arrest is for the offense which the State has charged, with which puts the burden on the State to prove, the reason itself is immaterial and irrelevant.

THE COURT: Objection overrulled, go ahead.

MR. JACKSON: (Continuing)

Q. If I understood your statement correct and if I'm in error, of course, tell me that I am . . . You said that when you were in here, inside, you asked the group to move out, because you didn't want to put anybody in jail or arrest them?

A. I wanted to get them outside so I could talk to them away from the group of people.

Q. Didn't you say a moment ago that you didn't want to put anybody in jail and you wanted to take them outside, so that you could talk to them?

A. Well, at the time I walked up to them, I didn't know what the trouble was. After talking to them and finding out that Owens claimed that Smith stepped on his foot ---

Q. Well, now let's don't go into it ---

MR. MUSLEH: Just a minute, Your Honor, he asked for it. He asked him a question, what was the reason. Now, he has opened the door, and the man has got to give his reason, and he can't be confined to exactly the one answer, which he is trying to elicit from him as being the reason. When you ask why a person did that, you sort of open the door as to why.

MR. JACKSON: I agree with counsel relative to asking his reason, but I asked him a specific question, which was relative to the time that he was inside of the terminal and his statement to them, was, get out so we can settle this thing. I think I was addressing myself to that.

THE COURT: The Court has ruled counsel has the right to bring that out on Redirect, if necessary. . . Go ahead.

MR. MUSLEH: My objection Your Honor, I didn't get the Court's ruling. Is he allowed to answer the question without being cut off? That is the only thing I object to. I don't object to the question at all. I do object to counsel not letting him answer as to the reason without counsel cutting him off.

THE COURT: You can improve him further on Redirect.

MR. JACKSON: (Continuing)

Q. I'm trying to think of what you said earlier . . . I understood you to say to this Jury that when you walked up to this group of six men, that your intentions then and what you said to them was to go outside, so we could settle this thing?

A. That's basically true, yes.

Q. I just wanted to see if I was right, and then my question to you was this, that when you said that to them, you did not intend as I understood you to say to arrest anybody, or have to put anybody in jail, isn't that right?

A. That's right.

Q. Now, isn't it true that the reason you did arrest these Defendants was because something happened outside here, isn't it?

A. It was the combination of the entire proceedings, after my contact with them.

Q. When the Defendants were standing out here, this Defendant was standing out here, did he ask you to permit him, to let you permit him to go into the cafeteria, so that he could use the facilities there?

A. His words were that we are I.C.C. passengers, we are hungry, we want to go in and use the cafeteria.

Q. Now, where was he standing when he said that?

A. Outside the West door.

Q. He was standing outside the West door . . . Did you permit him to go and use the facilities?

A. No sir.

Q. Your instructions to him then were no, you get on the bus?

A. That's true.

MR. JACKSON: That's all.

REDIRECT EXAMINATION BY MR. MUSLEH:

Q. One question and that is all . . . At the time, Smith, Callender and O'Connor was standing in this area, you had talked and talked and tried to pursuade them to leave, and then in the view of Penuel across from Max, and in lieu that there was still people in the bus station here, did you have reason, apprenhension or fear that their presence there at the bus station, not in the bus would cause a breach of peace?

A. Yes sir.

MR. MUSLEH: No further questions.

RECROSS EXAMINATION BY MR. JACKSON:

Q. Well, another question . . . Did you think that this Defendant was going to do something to someone to breach the peace?

A. There was a possibility of it.

Q. You didn't see him before doing anything to anybody, did you?

A. I seen him shove another man.

Q. You said you saw the hand on each other?

A. They had to place them there.

MR. JACKSON: That's all.

MR. MUSLEH: No further questions.

The witness was excused.

WHEREUPON, the State called to the stand, the witness, MR. DOUG WILLIS, who having been sworn by the Court according to law and testified as follows:

DIRECT EXAMINATION BY MR. MUSLEH:

Q. State your name, please?

A. Doug Willis.

Q. And your occupation, please sir?

A. Sheriff of Marion County, Florida.

Q. How long have you been Sheriff of Marion County, Florida?

A. Since January 3rd, this year.

Q. Is this your first term?

A. First term.

Q. Prior to being Sheriff of Marion County, Florida, did you have any previous law enforcement experience?

A. Approximately thirty years in all.

Q. What was your experience just prior to becoming Sheriff?

A. I was Chief Civil Deputy for the Sheriff of this county.

Q. Prior to becoming Chief Civil Deputy Sheriff of this county, did you have any law enforcement experience with other agencies?

A. I worked with the City for four years as city policeman. I worked with the State Highway Patrol for nine years, and then with the Sheriff's office of this county for the last eleven years.

Q. All and all in the last approximately eleven years you have been with the sheriff's office of this county?

A. Yes sir.

Q. That has been your life work, has it not?

A. It has been, yes sir.

Q. Doug, on the 16th day of June, 1961, were you at the bus station, the Greyhound bus station in Ocala, Florida?

A. I was.

Q. What was the occasion for you to be there?

A. We were notified that the so called freedom riders were coming in by bus.

Q. Mr. Willis, when you say we were notified, who do you have reference to, the Sheriff's office?

A. The Sheriff's office.

Q. All right, go ahead.

A. So we were at the bus station, several members of my department.

Q. Now, were you at the bus station around noon or 12:30 on this date?

A. I was.

Q. Now, did you observe a commotion inside the Greyhound bus terminal with the Defendant, James O'Connor was involved?

A. I did.

Q. Tell the Jury what you observed.

A. I saw this little scuffle inside the building. I was at the South door.

Q. Was this Defendant scuffling?

A. Yes sir, he was moving around sort of, if they were being pushed a little bit and he was pushing somebody and somebody was pushing him, I couldn't tell just exactly what was going on.

Q. All right, when you saw that, what did you do?

A. I immediately opened the door and started in the waiting room.

Q. Excuse me, you said in the South door . . . Presuming this is Monroe Street, this is Magnolia Street, is there a door in this area here?

A. On the South side, yes sir.

Q. This South side.

A. But I came in the West door.

Q. The West door being right where the buses were parked?

A. That's right.

Q. Tell us when you came in, what you saw and what you heard.

A. When I opened the door, the Defendant and several others were being not pushed, but being encouraged to leave the building.

Q. Encouraged how?

A. Forced to more or less by the Deputy, by Deputy H.A. Geiger, who is my Chief Deputy.

Q. How many people was Mr. Geiger taking out of the building?

A. There were six or seven in all.

Q. In all . . . All right sir, what happened now when you arrived there at the West door?

A. After they got outside of the door, Mr. Geiger insisted they all leave the scene.

Q. That's including the entire six or seven that were there?

A. That's right.

Q. Who left?

A. The white people that were involved in the thing, three white men left the scene?

Q. Now, did one of the three white men return or attempt to return to the scene?

A. Yes sir.

Q. And what happened to him?

A. I told him to leave immediately, or we would take him in custody.

Q. Did he leave?

A. He left.

Q. Do you know Callender and Smith?

A. I do.

Q. Was Callender and Smith with O'Connor inside the bus terminal and outside?

A. Yes sir.

Q. Did you see the three of them together?

A. I did.

Q. Did this commotion that you say that you saw inside the bus terminal at the West door, was Smith and Callender along with O'Connor involved in that commotion?

A. Yes sir.

Q. Approximately (strike that)

Q. When they came out at this assistance of Mr. Geiger, the three white people involved left, is that right?

A. Yes sir.

Q. Now, did you identify yourself and your position to the Defendant, O'Connor, also to Callender and Smith?

A. I did.

Q. What did you say to them?

A. I told them I was ---

Q. First, what did you say to O'Connor?

A. I talked to the group. I told them ---

Q. Just tell what you said to O'Connor.

A. I told him I was Sheriff of Marion County, Florida.

Q. Did you tell him your name?

A. I did.

Q. In your lapel here, the badge, will you describe, if you had that on this particular time, June 16th, 1961?

A. I did.

Q. Is there any inscription upon this badge?

A. Member of the Florida Sheriff's Association.

Q. Now, do you have a tie clasp on now, which is the same tie clasp that you had on at that time?

A. I do.

Q. And is there any inscription upon the tie clasp?

A. Yes, Sheriff and a badge.

Q. It says the word, "Sheriff," is that right?

A. Yes sir.

Q. You had that on at that time?

A. Yes sir.

Q. Did O'Connor question who you were, or your official position?

A. No sir.

Q. What happened now when you arrived and identified yourself, Sheriff, what did you say to O'Connor?

MR. JACKSON: I object.

MR. MUSLEH: It's still the same unlawful assembly, Your Honor. It is part of the res gestae.

THE COURT: What is the ground you are objecting on?

MR. JACKSON: I object. I don't want to state it here before the Jury.

THE COURT: You can state the grounds.

MR. JACKSON: Same objection as I stated prior.

MR. MUSLEH: I think it is the same objection as you made to Mr. Geiger's testimony involving this question.

MR. JACKSON: That's right.

MR. MUSLEH: I think the Court's ruling would be the same.

THE COURT: It would be the same ruling.

MR. MUSLEH: (Continuing)

Q. What actions did you do at that time when you arrived on the scene and identified yourself?

A. After my identity, H.A. Geiger having told him several times to leave the scene, either get on the bus or leave the scene and he refused to, that is when I identified myself as being Sheriff, and asked him to leave the scene or get on the bus, and they refused to do that, so we immediately placed them under arrest. I told them they were under arrest and H.A. Geiger also told them.

Q. Mr. Willis, how long had you been in the vicinity of the bus station on this particular date, June 16th, at the time?

A. When they arrived, how long had I been at the scene?

Q. Yes.

A. A matter of a few minutes.

Q. Did you see any other group of so called "freedom riders" use any facilities at the bus station at the time of this incident in which the Defendant, O'Connor was involved?

A. No sir.

Q. You did not see it yourself?

A. No sir.

Q. Now, did any groups to your knowledge of "freedom riders" arrive in Ocala and use the facilities of the Greyhound bus terminal, both before and after the Defendant, O'Connor arrived in Ocala?

A. I didn't personally see the first group that came in, there was a group that came in in the morning about 9:00, but I didn't see those.

Q. Any incident involve with them?

A. No incident involved, no sir.

Q. Did any group that came in after O'Connor was arrested?

A. Yes sir.

Q. Was there any incident involved then?

A. No sir.

Q. Did those groups use the facilities in its entirety at the Greyhound bus terminal?

A. They did.

Q. Did you or any of your men attempt to obstruct any freedom riders from using any of the facilities of the Greyhound bus terminal?

A. No sir we did not.

Q. Was the only obstruction at all towards Callender, O'Connor and Smith at the time of this incident which occured on June 16th?

A. That's all.

MR. MUSLEH: You may inquire.

CROSS EXAMINATION BY MR. JACKSON:

Q. You said, I believe that the first notice of the incident that you were at the West door?

A. Yes sir.

Q. Where was the Defendant standing when you first noticed him?

A. He was within a few feet of the door.

Q. In other words, you were outside of the building?

A. I was outside of the building.

Q. And you were looking through a glass door?

A. Yes sir.

Q. Who was standing on the outside of the snack bar, if you recall?

A. I don't know.

Q. Were any persons standing out there?

A. I think there were people on the outside. I'm positive there were some people outside.

Q. You mean standing out here?

A. Not at the door, no.

Q. Did you see anyone standing at this entrance?

A. Not right at the door, no. . . There were people on the plat form.

Q. Did you see a fellow there with a camera?

A. I did not . . . I saw several people around the area with cameras during the day, but I don't remember seeing a camera at that particular time.

Q. Now, did you see Mr. O'Connor put his hand on anyone?

A. I did see him put his hand on Smith, the fellow that was on trial previous here. He had him by his arm.

Q. Oh, I see . . . In other words, you saw Mr. O'Connor have his hand on one of the other Defendants, is that right?

A. That's right.

Q. You did not see him have his hand on Mr. Owens, did you?

A. I did not.

Q. You were standing right there by the door?

A. I didn't notice --- I wasn't paying any attention to what was going on inside until the scuffle started.

Q. The scuffle you have reference to ---

A. When they started pushing another or one another around inside the building.

Q. Was that when the deputy was pushing them out?

A. Well ---

Q. Or was it when O'Connor was pulling on the other fellow by the name of Smith?

A. I don't recall just exactly what took place when he had him by the arm, but during the time when they were all going around and around more or less in the waiting room, near the door, I saw O'Connor with his hand on Smith's arm, right near the door.

Q. You never saw him with any hands on anybody else, did you?

A. I did not.

Q. Now, after O'Connor came out of the building and got out here, did he put his hand on anyone?

A. No I didn't see him put his hand on anybody.

Q. Did he curse anyone?

A. No.

Q. Did he talk in a loud voice?

A. No . . . No, He just insisted on going in and eat.

Q. He said he wanted to go in and eat?

A. Said he rode in on the bus and he insisted that he go in and eat.

MR. JACKSON: That's all.

REDIRECT EXAMINATION BY MR. MUSLEH:

Q. Mr. Willis, at the time that Smith, Callender and O'Connor were outside of this area here, the West door --- and that time that you testified there were other people still around there, did you have any apprehension, fear that their presence at the bus station would cause a breach of the peace in any manner?

A. I did.

Q. And what was that based upon?

A. Based on what had already taken place and I was down there for the sole purpose of preventing trouble.

Q. Mr. Willis, you have been in this law enforcement work most of your adult life, have you not?

A. I have.

Q. Have you had the occasion to see what would start off as a friendly quarrel end up in a little shuffle develop into a fight?

A. I have, many times.

Q. Have you during the performance of your duty ever broke up what appeared to be a little shuffling to prevent what possibly could be a riot?

A. Many times, yes sir.

Q. In the performance of your duty, your authorization, do you feel that you were obligated to prevent crime as you are to solve and to try to stop crime?

A. Yes sir.

Q. Is that what you have based your law enforcement career that theory?

A. I have.

Q. Had these Defendants got on the bus and their

A. No . . . No, He just insisted on going in and eat.

Q. He said he wanted to go in and eat?

A. Said he rode in on the bus and he insisted that he go in and eat.

MR. JACKSON: That's all.

REDIRECT EXAMINATION BY MR. MUSLEH:

Q. Mr. Willis, at the time that Smith, Callender and O'Connor were outside of this area here, the West door --- and that time that you testified there were other people still around there, did you have any apprehension, fear that their presence at the bus station would cause a breach of the peace in any manner?

A. I did.

Q. And what was that based upon?

A. Based on what had already taken place and I was down there for the sole purpose of preventing trouble.

Q. Mr. Willis, you have been in this law enforcement work most of your adult life, have you not?

A. I have.

Q. Have you had the occasion to see what would start off as a friendly quarrel end up in a little shuffle develop into a fight?

A. I have, many times.

Q. Have you during the performance of your duty ever broke up what appeared to be a little shuffling to prevent what possibly could be a riot?

A. Many times, yes sir.

Q. In the performance of your duty, your authorization, do you feel that you were obligated to prevent crime as you are to solve and to try to stop crime?

A. Yes sir.

Q. Is that what you have based your law enforcement career that theory?

A. I have.

Q. Had these Defendants got on the bus and their presence was removed, the laws of the present of the white people, who was involved, would there have been an arrest, Mr. Willis?

A. No sir.

MR. MUSLEH: No further questions.

RECROSS EXAMINATION BY MR. JACKSON:

Q. Sheriff, I believe that you said that at this time that you had apprehension of a possible riot?

A. Yes sir.

Q. Isn't it true sir that you had that apprehension the whole day that there may be some disturbance?

A. I did.

Q. In other words, the apprehension which you speak of was not caused by the Defendant by the fact that the whole thing that was happening the whole day, isn't that correct?

A. Not necessarily, people kept being around the taxi stand all day that day. People were coming in from other areas, that is what I base my opinion on.

Q. That wasn't anything this Defendant was doing?

A. He was involved in what was causing the people to accumulate, to gather.

Q. I mean it wasn't his planning or anything?

A. Well, not necessarily.

Q. Now, Sheriff, I believe that you had the men that you sent down there there, because you wanted to avoid any possible violence, or anyone being hurt, is that right?

A. That's right.

Q. You were there to protect the passengers that were coming in to the bus, or those who may come into the bus station for other purposes, am I right?

A. I was there to prevent trouble, that's right.

Q. Now, did Owens assist, or I should say insist that this Defendant not go in and eat?

A. I heard some voices inside the building, but I did not hear him make any statements to that effect, no sir.

Q. In other words, Mr. Owens was not concerned about him eating apparently?

A. Not as far as I know. . . I don't know what Mr. Owens said, I wasn't present when Mr. Owens was doing the talking right then.

Q. Sheriff, you said that you have one of those little Sheriff's stars on your lapel, is that right?

A. That's right, I wear it all the time.

Q. When you retire from being Sheriff, you still have that little pin?

A. What/

Q. Do you still have that little pen when you retire . . That pen belongs to you, doesn't it?

A. That's mine, yes sir.

Q. In other words, if you should retire, hope you don't the next five or ten years, you would still have that pin, wouldn't you?

A. I hope to have it, yes sir, sure do.

Q. What I am trying to get at sir, the fac that you are wearing that pin does not within itself that you are at this time an active Sheriff, does it?

A. I don't think if I had a badge on to be honest with you, if I had this badge on, it wouldn't indicate me being Sheriff, would it?

Q. What I am saying, I would like to answer your question, but I can't testify.

A. You could.

Q. I agree with you, it does not show that you are Sheriff.

A. That's right.

Q. However if a person should present that badge it would show they are trying to imitate an officer and you would have a right to arrest them, wouldn't you?

A. That's right. . . I have the badge to go with my name in case someone doubts me being Sheriff, I can show them the badge with my name.

Q. In other words, you would not use the button on your lapel to identify yourself as the Sheriff of Marion County, if you were in Duval County, would you?

A. No, I wouldn't necessarily want to represent myself as Sheriff anyway.

Q. It is very simple, you wouldn't use the button?

A. No.

Q. You were dressed in plain clothes just as you are right now?

A. Just as I do all the time.

MR. JACKSON: No further questions.

REDIRECT EXAMINATION BY MR. MUSLEH:

Q. Mr. Willis, you I'm sure Sheriff and counsel's view you would like to be Sheriff as many years as possible?

A. I sure would, I like being Sheriff.

Q. Nobody down there either Smith, Callender or O'Connor asked you to say --- asked you for rather any identification after you presented yourself as being Sheriff?

A. They did not.

Q. They did not?

A. No sir, the only time I was questioned, my Chief Deputy was questioned about his authority, Mr. Owens questioned Mr. Geiger and I knowing Mr. Owens, had seen him before, he knew me, he worked for a company here in town, I told him that H.A. was my Chief Deputy, he had no right to doubt it and he accepted that.

Q. Of the six who were involved in this incident, the only one who questioned any authority was Owens, one of the white men who disbursed?

A. That's right.

Q. He questioned the authority of Geiger?

A. That's right.

Q. And you confirmed who Geiger was?

A. Correct.

Q. And you did present yourself to the Defendant here as being the Sheriff of this county?

A. That's right.

Q. He did not ask you for any identification or proof whatsoever, is that right?

A. That's right.

Q. You are entitled to wear civilian clothes as Sheriff of this county?

A. Yes sir.

Q. You have been in uniform a lot of years, haven't you?

A. I have.

MR. MUSLEH: That's all.

RECROSS EXAMINATION BY MR. JACKSON:

Q. I approve of the sheriff wearing personal clothes, and I'm not questioning that, sir, understand that . . . However, it was very difficult for Mr. Owens to accept Mr. Geiger has not beeing in uniform being a Deputy Sheriff?

A. He goes in civilian clothes, too. . . He has that authority.

Q. As I said, I'm not questioning the authority of it, and I'm not saying it was right or wrong, I think it is a question for the Sheriff to determine. . . Now, Mr. Owens, actually is a resident of Marion County, is he not?

A. He is.

Q. But he had to question Mr. Geiger about his authority in fact to the point that you had to go and tell him yourself whom he knew to be a Sheriff that this is your deputy, isn't that true?

A. He reached in his pocket for his badge and at that time I told him, he had no reason to doubt him, he was my Chief Deputy.

Q. In other words, Mr. Owens knew that you were the Sheriff of Marion County?

A. He did.

Q. And when you said this is my deputy, then that was sufficient, wasn't it?

A. Right.

MR. JACKSON: No further questions.

MR. MUSLEH: That's all.

The witness was excused.

WHEREUPON, the State recalled, MR. H.A. GEIGER, who having been previously sworn by the Court according to law, and testified as follows:

DIRECT EXAMINATION BY MR. MUSLEH:

Q. Mr. Geiger, let me ask you this question, please . . Isn't it a fact that prior to June 16th, 1961, at the Greyhound bus terminal in Ocala, Marion County, Florida, that negros had used the entire facilities of the bus terminal?

A. Yes sir.

MR. MUSLEH: That's all.

MR. JACKSON: No questions.

The witness was excused.

WHEREUPON, the State called to the stand, the witness, MR. JOHN H. OWENS, who having been previously sworn by the Court according to law and testified as follows:

DIRECT EXAMINATION BY MR. MUSLEH:

Q. State your name?

A. John H. Owens.

Q. Your address?

A. Route 4, Box 521, Ocala, Florida

Q. On or about the 16th of June, 1961, were you in the Greyhound bus station?

A. Yes sir.

Q. Were you there at approximately 12:00 or 12:30 noon of that date?

A. Sometime between that.

Q. Did you on that occasion see the Defendant sitting here at the table, James Richard O'Connor at the bus station?

A. Yes sir.

Q. Tell the Jury now under what circumstances that you saw him.

A. How I met him?

Q. Yes.

A. Well, I was starting out the West door of the waiting room and I met the fellow, Smith at the door, opened the door and walked right in, and he walked in to me and stepped on my foot, and then in moving or something, why, O'Connor, he come up from --- well, there was a little commotion, I don't know just exactly, I would say I probably shoved Smith a little bit, or something and then O'Connor grabbed him by the arm, and it looked like he was trying to push him into me.

Q. Well, let me ask you first . . . Did O'Connor and you come into physical contact with each other at all?

A. Well, in him slinging his arms by pulling Smith, why, he probably ---

Q. Not probably, did he come in contact with you?

A. Well, his arms hit mine.

Q. His arm struck your arm?

A. Yes.

Q. Now, at that point there and subsquently now, did any group of people gather around this little fracus there, which was going on?

A. Yes.

Q. Did Officer Geiger come up?

A. Yes.

Q. What was his instructions to you, O'Connor, and the rest of you from Officer Geiger?

A. Officer Geiger told me to go home, or to leave, and he also told O'Connor to get on the bus.

Q. Now, did Officer Geiger remove you from the inside of the bus station to the outside?

A. Well, no I was just outside of the door, fixing to go out . . . There was little shoving going on, I don't remember just exactly what it was, but I was right at the door, and I couldn't say whether I was just inside or just outside.

Q. How many people were around the scene inside the door when you and Smith first encountered each other, did you attract other people?

A. Yes.

Q. Now, when Officer Geiger informed you to go, did you leave?

A. Yes.

Q. Now, were there any exchange of words between you or any other people that you heard there, and O'Connor or Smith -- any exchange of words at all?

A. Well, I heard the remarks that somebody told him that ---

MR. JACKSON: I want to object, Your Honor unless it was Mr. O'Connor.

MR. MUSLEH: Your Honor, I feel that any remarks that were made at that particular time would certainly give reason to believe that where a lawful meeting became unlawful and that is very vital to the part of the testimony presented here today. Whether or not the officer had apprehension of fear there may be violence based upon any words or remarks in exchange between any of th of the group there at the station, if this man heard it, right in that vicinity in his hearing distance at that particular time, I believe would be admissible.

THE COURT: The Court feels that it is pertinent under the res gastae, and will admit it, Objection overrulled.

MR. MUSLEH: (Continuing)

Q. What did you hear, the remarks that you heard?. . .

That is, at the time of this shuffle?

A. Well, there was some of them said they hoped to get back on the bus. Now, I didn't recognize who it was that said that.

Q. I'm not asking you who, just tell us what you heard.

A. That remark was made, they hoped to get back on the bus that they got off of.

Q. Now, was that remark made in your opinion in an angry manner?

A. Well, I wouldn't think that a fellow would say that unless he was a little angry, because ---

Q. In your opinion, was that remark made in an angry manner?

A. Yes.

Q. Was there any exchange of words between you and Mr. O'Connor?

A. Not that I know of.

Q. Were you ordered to disburse by any other officers other than Officer Geiger?

A. Yes.

Q. By whom?

A. Chief Alverez.

Q. Chief Alverez?

A. He was behind me and he told me to go on.

Q. He is Chief of the Ocala Police Department?

A. Yes.

Q. And you left?

A. Yes.

Q. Did you return to the bus station?

A. No.

MR. MUSLEH: No further questions.

CROSS EXAMINATION BY MR. JACKSON:

Q. Now, Mr. Owens, I believe that you said that you were on the way out of the bus station when Reverend Smith came through the door of the West door of the premises, is that right?

A. Yes.

Q. I believe you also testified that Reverend Smith stepped on your foot?

A. Yes.

Q. And there was a possibility, you didn't say that he did, but there was a possibility that you pushed him back, is that right?

A. Yes.

Q. Now, what did Reverend Smith do?

A. Well, he stood there and looked at me a little bit, and started backing up and O'Connor had pulled him by his arm, telling him about the lunch counter, which was back of him.

Q. In other words, Mr. O'Connor told a hold of Reverend Smith telling him the lunch counter was this way?

A. Yes.

Q. And sat --- Started going in that direction?

A. Yes.

Q. Now, when you said they were there, you were inside of the place at that time, is that right --- you were still inside of the premises, is that right?

A. Yes.

Q. Did you start to walk out the door?

A. Yes, I at the time was right at the door.

Q. In other words, you were fixing to leave Reverend Smith and Mr. O'Connor, is that right?

A. Well, I was at that time waiting for him to apologize to me, Smith.

Q. But where was Smith standing then?

A. Well, he was always in front of me, between me and the door.

Q. When you started to walk out of the door, did that make Reverend Smith back up to the door which you were going out?

A. Yes, he was backing up.

Q. Backing up out of your way?

A. Yes, he was backing up, either I had shoved him a little, one or the other. Now, I am pretty sure that I had shoved him a little when I was leaving.

Q. The only contact then, you say was when the person bumped into you, you shoved him back off you?

A. Yes.

Q. And he backed up then off of you?

A. Yes.

Q. Now, Mr. Callender --- Mr. O'Connor didn't say anything to you at all, did he?

A. No, he didn't say anything to me at all.

Q. Now, however, he did take Reverend Smith by the arm to show him that the lunch counter was over here?

A. Yes.

Q. And started going in that direction?

A. Yes.

Q. And it was at that time that the officers came up, isn't that true?

A. No, not just then, it was right afterwards. I would say it was a matter of seconds that Smith was out the door, of just about out. Mr. O'Connor was running around him talking to him.

Q. Talking to Reverend Smith?

A. Yes.

Q. Mr. O'Connor didn't say anything to you?

A. Not that I remember.

Q. Now, you don't recall O'Connor pushing you, do you?

A. Yes, right as we went out the door, about the door there was a little shove by him on me with one hand, his right hand when we went out the door.

Q. What side was he standing on?

A. He had gotten around and circled around Smith several times, one or two times.

Q. He was on the other side of Reverend Smith?

A. Not at this time. . . Best I remember, there was someone between that walked up to my side, the side O'Connor, and he come around in front of me.

Q. Now, you said that you wasn't sure whether Mr. O'Connor struck you or not, or pushed you down?

A. As he come in with Smith, I wasn't sure.

Q. Now, Mr. Owens, you weren't there trying to start or stop Mr. O'Connor from going into the counter, or doing what they wanted to, were you?

A. Well, I wasn't stopping them from the counter, but I would stop anybody from trying to do what they wanted to do, sometimes in some cases or try to.

Q. Well, I mean by that, you had gotten involved here, because someone had stepped on your foot?

A. Yes.

Q. But that was the only thing you were involved in, is that right?

A. That was it.

Q. That was it?

A. Yes, you're right.

Q. You didn't tell the officer that you didn't want the people, or the Defendant to go in there and eat, did you?

A. No sir.

Q. You didn't Mr. O"Connor that either, you didn't tell him?

A. No.

Q. In other words, the only concern you had was that the fact that somebody had bumped into you?

A. Yes.

Q. After the officer pushing you all outside, the officer came from the inside, and pushed you all outside, is that right?

A. Yes.

Q. And started pushing you out the door, and other folks too?

A. Well, there was some pushing done back behind.

Q. Back behind --- Smith and O'Connor were in front of you weren't they?

A. Yes. . . O'Connor was just to the left in front of me. He wasn't directly in front of me.

Q. Now, do you recall the other two men that were standing up there at that time when the officer started pushing you out the door?

A. What do you mean by the other two men?

Q. Well, the three white men involved, and I want you to tell me if you recall the other two?

A. Well, there were several white people behind me. I knew some of them. Mr. Penuel was there, but they were somewhere behind me.

Q. They were behind you?

A. Yes. . . There were some of the others, some other fellows that I knew were about the bus station, but I don't recall their names exactly, because I don't know they well enough to be able to say their names.

Q. And then the only two people that you saw that were coming in the door at that time was Mr. O'Connor and Reverend Smith, is that correct?

A. Yes.

Q. And all theother people that came in, they were in the back of you --- I'm trying to get the picture now more or less.

A. Yes, they were all back --- of course, there were some others, I didn't follow. I didn't know them.

Q. I mean outside of the building?

A. Yes.

Q. Where were they standing at?

A. Well, they were close to the door.

Q. Standing up in here?

A. Yes, kinda little circle on each side, I don't know exactly how many.

Q. Do you recall seeing a fellow there with a camera standing outside there?

A. Yes.

Q. Would you tell the Court and the Jury about where he was standing?

A. Well, he was approximately three feet outside the door and two feet to the right as you go out the West door.

Q. Did you ever see him come inside the building?

A. No sir.

Q. Would that person be Mr. Callender that was with these other people?

A. Well, I don't know him real well, but you know, but I would say that it was, because I have seen him outside with these other people.

Q. Is that the fellow you have seen outside with them? I'll ask him to stand.

(Man stood up out in audience)

Q. Is that the fellow there?

A. Yes.

Q. That is the fellow that you saw standing out there on the outside with a camera, is that right?

A. Yes.

Q. Are you sure about that?

A. Yes, I am sure.

MR. JACKSON: I have no further questions.

REDIRECT EXAMINATION BY MR. MUSLEH:

Q. At the time, you and Smith came in physical contact, you say was in the doorway of the bus station?

A. Yes, I would say it was about three feet inside.

Q. Inside the building?

A. Yes.

Q. You were walking West towards the door, Smith was walking East towards the inside of the building?

A. Yes.

Q. O'Connor was walking with him, is that correct?

A. Yes, he was walking with him and to Smith's left.

Q. To his left?

A. Yes.

Q. Now, at the time you claimed that Smith stepped on your toes, was your attention then focused upon Smith?

A. Yes.

Q. And upon O'Connor?

A. Yes.

Q. You said several people then gathered in a circle?

A. Yes.

Q. You don't know who all those people were?

A. No, I don't know because they were behind me.

Q. And some in front of you, too?

A. Some in front, and others coming up, and about that time in a matter of seconds the officers got there.

Q. The first time you recognized the person you identified in the Court Room as Callender with a camera, to recognize him was outside of the door?

A. Yes, just outside the door.

Q. Can you swear whether he ever came inside the door now?

A. No, because I left.

Q. Can you swear that he was inside the door before?

A. No I couldn't swear.

MR. MUSLEH: That's all.

RECROSS EXAMINATION BY MR. JACKSON:

Q. In other words, Mr. Owens what you are saying that this thing happened very quickly, did it not?

A. Yes.

Q. In other words, when this fellow stepped on your foot, you say you pushed him back, stepped back and you started towards him, and he started backing up towards the door, and that is when you came on out, the officers came on in and started pushing you all out the door, is that right?

A. Yes, they started pushing me on out/

Q. And when you first saw the fellow you call Callender, he was standing outside of that door?

A. Yes.

MR. JACKSON: That's all.

REDIRECT EXAMINATION BY MR. MUSLEH:

Q. You were pushed outside the West door by force, is that right?

A. Yes, well, I wasn't exactly pushed, I was asked to leave and Officer Geiger caught me by the arm and more or less pushed or said that I should leave.

Q. Officer Geiger took his arm and put it on you?

A. Put it on my arm.

Q. Put it on your arm and sort of assisted you in leaving that bus station?

A. Yes.

Q. And then he told you to get?

A. Yes.

Q. And you got?

A. I left.

MR. MUSLEH: That's all.

MR. JACKSON: No further questions.

The witness was excused.

MR. MUSLEH: The State rests.

MR. JACKSON: Your Honor, may I have about a five minute recess?

THE COURT: All right, you gentlemen may retire from the Court Room to your Jury Room for five minutes. The Court will be in recess.

WHEREUPON, Court was in session after the recess.

MR. JACKSON: The Defense rests. . . Your Honor, I would like to make a motion at this time, for a directed verdict of accquital on the grounds that the State has failed to prove the charges against this Defendant. Number 1 is that the officers testified or at least one officer testified that this Defendant, there were three Defendants inside the bus terminal. The State's witness, that was more involved than any other person testified that there were only two, that Mr. Callender as charged in the Information, an Information cites that Mr. Callender as being the third person said that Mr. Callender was outside of the bus terminal, that he was outside there and he had a camera. The Statute requires that if three or more persons meet together, the position of the Defendant there were not three of them inside, not three of them had met inside to do anything. If Your Honor through a stretching of the imagination said that the three outside of the bus terminal was the Unlawful Assembly, then they were assembled there by the officers, because the officers was responsible for them being out there. He told them to go out there. It surely would be phenomenal in out law, if our officers can tell a citizen to do something and he does that, that he can then be charged with Unlawful Assembly. I would like to point out to Your Honor that is a material variance in the Statute, 870.02, State of Florida that requires three persons, so consequently we say that the State has failed to prove the essential elements of the crime and therefore the Court would be in good order and proper order to direct this Jury to find the Defendant not guilty.

MR. MUSLEH: Your Honor, in response therto, I belive the testimony has been induced from the witness stand first by Deputy Geiger puts all three inside the bus station, puts all three involved to some degree in a tussle. Now, the witness, Owens did not testify nor would he swear that Callender was not inside of the bus station. His testimony was I didn't see him inside the bus station, which is negative testimony and negative testimony is never a ground for a directed verdict. When you have positive testimony to place him there. We have required, or we have complied with the Statute, we feel there is sufficient evidence to make a prima facia case to go to the Jury.

THE COURT: The Court feels there is mere conflict of the testimony and therefore will deny the motion. . . The Court at this time, do you have any --- I believe your charge number 4 with regarding about the evidence of previous crimes would not apply in this case?

MR. JACKSON: That's correct.

THE COURT: Did you wish to have number 5 given about the interstate?

MR. JACKSON: Yes sir.

THE COURT: All right.

MR. MUSLEH: May I see number 5?

(Counsel looking at instruction number 5)

MR. MUSLEH: Is this the Court's charge?

THE COURT: Well, he had a charge, three charges and I attempted to consolidate them in one charge.

MR. MUSLEH: And that is this charge here?

THE COURT: That's right.

(Discussion off record)

MR. JACKSON: There is one other matter, if I may submit for your consideration?

THE COURT: All right.

MR. JACKSON: That the Jury should be instructed that this Defendant is not charged with failing to obey an officer, and that only Unlawful Assembly, and they are not to take into consideration.

THE COURT: Could you write one up?

MR. MUSLEH: The State objects to that, Your Honor.

THE COURT: Well, I am going to advise them what the charge is.

MR. MUSLEH: Counsel now says to negatively instruct him that we are not trying him on some other charge. You can define the charge as being tried only the essential that they find him guilty and that they existed at that time.

MR. JACKSON: I agree with counsel Your Honor there is no other charge, I think that the testimony however hinged on both charges, which I had argued previously, and I think that in fair-- ness to the Defendant that it should be made clear to the Jury that they are not here trying this Defendant on failing to obey an officer, but merely upon Unlawful Assembly, so as to give the Jury an understanding of what they are trying to find.

MR. MUSLEH: With the instruction that you have there now --

THE COURT: That is why I asked him to write it up, so I would know what he wanted.

(Discussion off record)

MR. MUSLEH: The way it is worded there, I have no objection.

THE COURT: The Court will designate this as Defendant's request for instruction number 6.

WHEREUPON, the Jury was returned to the Court Room.

THE COURT: At this time the counsel will argue the case before you, I believe Mr. Jackson will have the opening.

MR. JACKSON: May it please the Court, and gentlemen of the Jury, this is a privilege that counsel has to talk to you, and you can't talk back to him, which I think is a little bit unfair, but it is our opportunity to view the evidence and to give you our impressions of how the law is.

The Court will give you the law upon the facts and you are bound by the law, which is given by the Court. What I say here and what Mr. Musleh says here as lawyers is not evidence in the case. We are not here, or we are here and do know more than try to recapitulate what has happened here in Court as we see it as attorneys and as the law should apply. I hope that you will give it that and no more. If I should say something about the evidence that you don't remember, or if I should say something about the evidence that was not as you remember it to be, feel free to disagree with me and I'm sorry, because it is not my intention to say something that was not said in this particular case. It is an error on my part, and I hope that you will not hold that against the Defendant in your deliberations.

Now gentlemen when you sworn in as Jurors, I asked you to remember a question, and I can realize that some of the questions I asked you might have been a bit aggravating, but when it calls for the duty enforced upon me as a lawyer, it is my job to give this Defendant the benefit of my skill every possible way as long as that way is legally and is possible. However, I said this that I hope whatever if I did cause some bad feelings in your mind that you will not hold that against the Defendant, because I am not in trial, he is on trial and you promised as Jurors under your oath to try this Defendant on a free of any bias or without any prejudice whatsoever and this is your promise, that is only what I can depend upon.

Now, in a case of this sort there are always some feeling that we all have. It is impossible for people to be totally neutral in life. We have a feeling one way or another and of course the purpose of a trial is to bring people before the Court and to have them determine and your minds made up on the basis of the evidence that is in Court, and if you have a different feeling, a different idea, that should not be applied in the case, because then you would be using your seal and the power of this Court to do what you personally would like to do, which is unfair and the conduct of any man in that position. In other words, the two would be on the street, there would be three citizens to talk and discuss and do what they like. Each of the Defendants are as such, and in a Court Room, you are put in rather a supreme position, because of the fact that we have a democracy, which says that a man is entitled to a trial by Jurors, and that powers is given to you. It is not really your personal power, but is a power of the state and it is the state that we are all supposed therefore to defend and to protect its integrity and the members, by which the powers are used.

Now, I know that you as Jurors are confronted with another power. I know that perhaps you have read about the case that preceeded this involving one of the so called "freedom riders." I know that you know how the Jury did. Now, in your minds, can you do something different than that Jury. Well, if you were, you should have told me that when I asked you the questions, could you try this case on the basis of the evidence in this case, and you told me that you would. That you would use no other method of trying. In other words, the Jury yesterday did one thing, which is not binding on you, because you are sworn to try this case not on what they did, but from what the evidence on this stand is and that is the verdict this Defendant is entitled to, and you swore that you would give him that protection. Now, I hope that you will do that because that was your promise to your God.

Now, it is unfortunate in our system that you see we have a Jury panel and all of us come up here today and together, and we all try different cases, and sometimes we feel that we are part of the panel, we are part of some kind of organization, but we are not, we are still free American citizens, and we are here for the purpose of trying to make a fair and impartial determination of the laws of this state, and that is what I want very much for you to do in this case, and I haven't asked you for anything, but that. It may be that you will go against some opinions of other people may say, may go against others, but that is the quality of a Juror, he has to stand in that position. You can not please everybody, but surely you are sworn here to do what the evidence and the law say should be done regardless of what the after effects may be. Now, if you couldn't do that when I asked you the question, you should have said no. You are not required to serve as a Juror. You serve because you are called, because you accept the challenge. You accept the challenge to be Juror or determiner of the fact in the arms of our Court. It is just like a soldier that goes out and fights the battle on the front. There are some soldiers that will fight in the states. There are some that will fight upon the continent, some in the office work, there is a soldier that stands out on the front lines exposed to the danger. That soldier that was sentenced had to go forward to keep us strong. I realize that the soldiers behind him are essential in keeping him going, but he is a soldier that must risk his life. He is the soldier perhaps that must take a life. He is a soldier that must take a position, that is not always easy, it is difficult and it is hard. Sometimes we come back and sometimes we don't, but whatever we do, we do because we love the country and the people that erected it. We give them more time to do what they are supposed to do and want to do, and I can assure you that regardless of what people say, there is no greater country or government or people than the people of the United States. I say that here and I say that everywhere, because that is what I believe, and that is what I predicate myself on. We often here the talk of rights of the Federal Government, and rights of the people. Under our laws, it says that so many powers are granted to the Federal Government, those that are granted to the Federal Government are reserved by the states. Now, often you hear that, and that's the end of it, you say what is that in itself, it must be a mistake, the truth is, that particular provision of the Constitution goes even further and says this, the powers that are not granted to the Federal Government are reserved to the states and to the people, the people, and that is why you sit here as Jurors to see that the law is abided by. In that event and by this method, can easily forget you as an individual, because when you are charged with something, you become isolated, other society is on this side of the fence and you are on the other side, and when you sit on the other side, the question is, will the law defend you and protect you in your rights while you stand there, because as you know we are not all accepted by everybody all the time, and what good is the law, if it falls down when you find yourself on the outside. If it is good only when you are with the group, then we could not be American citizens, who believe in individuality. It is when you are outside and need help. The day the law, this day it counts a great deal to Mr. O'Connor. If you were in his seat, it would mean a great deal to you. Now, if the law breaks down when you are out there where he is, what good is it when you need it, because the test is the absence applied to the strong. I can assure you gentlemen that Americans have always stood up for the world and the law whether it was for us or against us. Our president once admitted that we were sending spy planes over and that was similar, that was against our entire character, but Americans have never been afraid to stand up for what was right.

Now, your chance is to stand up for what is right. You six men, can you really, you must answer to your God.

Now in this case, the Prosecution has charged Mr. O'Connor with Unlawful Assembly and of course, Unlawful Assembly was designed to prevent people from gathering together not to sing, not to talk about their interest in the community, not to eat and dine together, or to meet in legislative bodies, but designed to keep groups of people from joining together going out and doing something in a violent way so as to cause you, me and other persons to be subjected to a breach of the peace or put in fear of our lives, but there are two other elements involved, that they must combine and they must go out to do what they want to do in a violent manner. We in our jobs sometimes go our to see the boss man and ask for a salary raise, well, we have a right to do that. Don't you think the laws protect us to go down and get it, we do down and ask him for it, not take it away from him. In our churches we go down to meet the stewardss, and sometimes it is the pastor, and sometimes really we argue. We don't go to take anything from him. We go to discuss it with him. Now, if we started fighting him, then the laws try to keep down people from joining like gangs, going down and taking something in a group, or coming up with masks, mast groups. Now, that is what the law is our protection from. Now, you have got a client that in this manner, there was someone trying to take something from somebody or property and doing it in an illegal manner.

The definition the Court will read you will sound something like this. "Unlawful Assembly has been defined as a gathering of persons of required number without a common intent formed before at anytime during the meeting to attain a purpose lawful or unlawful that will interfere with the rights of others by committing disorderly acts in such a manner as to cause sane, firm, and courageous persons in the neighborhood to apprehend a breach of the Peace". Now, the part in this particular law is that by committing this disorderly acts in such a manner as to cause sane, firm, and courageous persons. This orderly act that Mr. O'Connor commit, what did he commit . . . According to Mr. Owens, and that is a State witness, Mr. Owens said, not Mr. O'Connor, but Reverend Smith stepped on his foot, and brushed up against him, and that he pushed him back. .The same person, Mr. Owens said that Reverend Smith backed up, not went forward, but backed up, why did he back up from the man. Do you back up to fight, or do you back up to get out of a man's way and the same Mr. Owens and this is a State's witness, not Mr. O'Connor, put the State witness said this. Mr.

Smith, he didn't say slap Mr. O'Connor, he didn't say push him down, he didn't say anything like that. He said, "here is the lunch counter over here," and pulled him towards that direction. Well, what was happening, he was trying to pull him away from the scene. Now, pulling a man away from the scene, I ask, is violence? If you convict him, that is what you would be saying. You would be saying that if another man finds two people even arguing or talking and he says, come along with me that he is committing an act of violence. It would seem to me that he was trying to keep the peace, not break the peace. Now, that was the State witness and he was there more so than anyone else. Now, can you as a Juror, who was not present, can you say anything differently. He was under oath and you are under oath. Under his oath he said that is what happened. He didn't think enough of what happened to break his oath. He thought enough about his oath to try to tell you what he saw to be the truth. Why should you as Jurors go further than what Mr. Owens has said?

Now, the Prosecution may say that the officer came in and said he looked up and saw some men scuffling or pushing, he said. He didn't see the people when they first got there or after. I asked Mr. Owens what did you see when you saw Mr. Smith coming from or through the door. He said, I saw Mr. Smith and I saw Mr. O'Connor. Now, I know that Mr. Geiger said that there were three of them in there, and yet he said there was a turmoil. Who was the person best able to see, the man, who was Mr. Owens, who was there who saw the man? You didn't see or hear Mr. Owens say Callender said anything to him. You didn't hear him say Mr. O'Connor said anything to him. He spoke to Reverend Smith, "the lunch counter is this way." Now, if you convict him, you will convict him for saying that. You promised under oath that if there was any doubt in any testimony or anything that you would resolve it in the favor of the Defendant.

Now, then, when an officer said that what happened, he was fifteen feet away behind him and Mr. Owens, who was right there in front and knew what he was confronted with, if he said something different, you must be in a state of unbelief. You don't know which one to believe. You promised that if you had a reasonable doubt, and it is a reason to doubt when two men under oath says something different that you would resolve that difference in favor of this Defendant. Now, why is that? Under the law, you are only to convict a man only upon what we are positive not what others think. Should you be judged by God or any other man by what others think you did, should you? You want to be judged by what you did, what you did yourself. I will be punished for what I did, not for what John Smith thought I did, because in your life time, you have been accused of doing things that you didn't even have in your mind, because you were probably near or about. Now, should you be convicted for what the man thinks you did, or what you actually did. These are sober questions, gentlemen, that you must answer, and you must answer them as truth starts down to earth American citizens, and you can not be afraid, because if you are afraid, you will not answer them. You will try to skip over them. I know when I came here I had a tough job, but I also know this that there was an American that once stood in the halls when people around him doubted what he was doing, when this nation was first created, who had the gall and intestional fortitude to stand up to the whole mob and tell them, you give me liberty or give me death.

There have been Great Americans all our lives and that is how we have become great. Not the man that went against the will of the Masters, but when the man stood up for the basic principals through criticism and through all the other things that have happened to him.

Now gentlemen, I'm not just talking to you, I'm saying what happened. Let us look a little bit further, I asked Mr. Geiger, who was the charging officer in this matter what was said. He said there was loud talking but now tell me, if you are loud surely you would be able to say what was said. The reason Mr. Geiger could not tell what was said, because it was not said that loud, but to be sure that I was right, I asked Sheriff Willis, "Sheriff, did Mr. O'Connor say anything in a loud voice," and you know what he said. He said, "no" I said, "did Mr. O'Connor put his hand on anybody, nobody but Smith." "I saw him," this is the Sheriff, your Sheriff and my Sheriff in this county said this. "I saw Mr. O'Connor put his hand on Mr. Smith, or the other fellow Smith, and they were bragging it up." You heard Mr. Owens say, who was in front of them that "yes he put his hand on Mr. Smith." Now, the question that comes in here that the Prosecutor tried to bring in here, that they had their arms on each other. Well, it was on each other, it apparently was a very light thing. Mr. Owens said I believe, yeah, I believe he pushed me when we were going out the door, then I came back in and asked him, isn't it true that the Sheriff was pushing you out of the door, and these gentlemen were in front of you and pushed you on in to them. He said, not exactly that, but gentlemen, you are the Jury. If this man had shown any other attitude of violence, I so would say to you there is a possibility that he pushed him, but when a man did not talk loud, he didn't use any form of profanity, he didn't say in words to go to Mr. Owens, but come on let's go to the dining room, or the restaurant. Now, those acts come with the facts that Mr. Smith or Mr. Owens is really definite whether he or I should not --- not really definite he was pushed or whether he pushed in to him, could you say with a moral certainity before your God that I testified that O'Connor pushed Mr. Owens, would you say that, and tell your God that you know that.

Gentlemen, the law is to believe beyond a reasonable doubt, why do you think the law imposed that upon you, because you are at this time the eye, the ear and the knowledge of this stat e in operation.

Now, if there weere not three people, I tried to get the Sheriff to say where Mr. O'Connor was. You see, I knew where he was. I said, Sheriff, was he out here, and Sheriff said no, he wasn't out there. I asked Mr. Owens, Mr. Owens, where did you see Callender when you came out of the door, I saw Callender out side. What did he have, a camera.

Now gentlemen, you have got to resolve that testimony, was he in there or was he out? Can you say that you are convinced beyond a reasonable doubt to a moral certainity that Mr. Callender was inside, and if there is a cause for a doubt, you would resolve in favor of the Defendant, not the State, because the burden is upon the State to prove, not the Defendant to prove his innocence, that is the law.

Now I realize gentlemen that you have heard a lot about the "freedom riders" coming from and I know all of our area has gotten excited about it, I realize that and let's not fool each other, let's not fool each other. We have said, that we don't like that, but what do we really have to protest to in Ocala. We say, why the devel, the lunch counter here is open to anybody, anyway. We don't care who comes and eats there. You heard the Sheriff say that people use it everyday, anyway. Now, we are not up here defending whether they should use it, because he said they use it anyway, the Sheriff said that, and we are not up here defending whether they should use it, because he said they are using it anyway. We may not like the fact that they come through but to do so, are we to use that to charge a man and find him guilty of an act. We are not trying him for that, and that I know is on your mind, because my mind is the same as all Americans, and I know because I have some feeling on this, you have feeling on it, but I also know that in your mind when you swear that you are not going to let those impressions come into your decision in this case, I want you to so prove to me that you will keep it out. I know this and I know that will do that.

Now, the Prosecution might come in and say we have brought these men in here and I have qualified you and I am your Prosecuting Attorney and I am here to present evidence to you, now, if you turn him a loose, you turn him a loose, and do you know what he says this for? I would say it, if I was in his position. He has kind of a tough probelem here. He has brought the man in here, I turn him a loose, he is going to tell the people, I would have convicted him, but the Jury didn't, but let me tell you the danger in that, over four hundred or five hundred years ago before this nation was born, one of the problems that caused this nation to be born was the fact that government was pressing the individuals, men died to see that government wauld go just so far and they asked that the Jury, men from the community come in here and sat as Jurors, not a Prosecuting Attorney, not the arresting officer, because we know, you will put your hand on a person perhaps unwisely. Now, that is what worries me and in the Constitution of your state and my state and the United States it is provided that a Defendant will be tried by a Jury, tried, if you let the Prosecution come in here and the officer arrested him, and I am prosecuting and I don't bring this charge before you, and you turn him a loose, then don't blame me about it and let that impress you, who is trying the Defendant? You or the Prosecution? You are not here to accept what he says, you are here to valuate what he says. Yours comes from the Constitution, your power comes from the Constitution and there was no need for thatpower invest in yours, we wouldn't need the Judge, the Clerk, we wouldn't need this Court House. We could put an office out there for the StateAttorney, or the County Solicitor and an office for the Sheriff and he could arrest them and turn them over to the County Solicitor and that would be it, but no sir, that was not the intention of our Constitution and gentlemen I am saying when you go to your Jury Room and start deliberating, and you let that be your guide and your course, you are sacrificing the blood of thousands of Americans, millions of them in fact who fault to retain this system of our government. You said under this, that you will die for it, I give it away, let's don't do that. Let's let nothing impost you, but the law now and the evidence, and if you turn him a loose, it is because you believe in the law. You believe in what is justice and not in a man. Now, what is your belief? That is the thing you have got to russle with. I say to you six men, that you are going to have to russle with that and russle with it just like an a biblical scene like Christ russled with the fellows all night trying to pursuade him and trying to attempt him and tell him, and that illustration simply said to mean as an American and I hope it does to you as an American, there will be trying days ahead for me, where I will have to stand up for what he knows is right and have many things about me, criticism, but am I a good enough American that I can laugh at them and other Americans to speak right up, except my criticism and be a free man. As long as there is that kind of freedom is in the side of American men, no nation on earth can destroy us. It is only when those who believe that other men are right without thinking for yourself or acting for yourself that we are in danger. No one can teach Communism to Americans. You could listen to them all day long and you ask them what they have got that we don't have. Can you say to our Justice of the Supreme Court, a Legislature, can you say to them, do they elect their president of their community? Can you say that I vote to put in whom I like, and I vote to keep him out, and I put on the Jurors I want to put in and I take off who I want to take off. What other nation can make these remarks and gentlemen when we become so united in a fearful attitude that we have to group together to defeat ourselves, we are defeating Americans. I want to leave this Court Room believing what I believe now. That I can go down into the depths of hell with Americans and come up with justice, I believe that, and if I didn't believe it, I wouldn't stand here and talk to you with all of my heart and understanding, it would be a waste of time. I want to keep that belief. I want you to tell your children that is true and that is what you must fight for.

Now, I know that you can go in there and easily find Mr. O'Connor guilty and come back out, I know that. People would pat you on the back, people will tell you that you did a good job, but as to protecting the rights and justice, if rights and justice is good, then that is all right, because we don't have to walk home witha bowed head. We can say this is America and justice is what the South stands for and we will let nobody change that. I was born in Georgia, raised right here in the state. I want to live where men live, but I would be afraid if I thought those men were no longer men. I know you have a job. I say the State has not proven this case against this Defendant.

Unlawful Assembly means you must have assembled with three or more persons to do a thing, but do it in what kind of a way, in a violent way. Now, what did Mr. O'Connor do that there was violence, that was illegal? I pray to God that you gentlemen will go out and do what I know that I believe you will do, bring back a verdict of acquital for this man, so that he may go back to New York, where he lives and say in Ocala, Florida, American justice lives and let no man tell a lie, thank you.

MR. MUSLEH: The Court and gentlemen of the Jury, I think Ernest Jackson, Sr., is a good lawyer. I congratualate you. I present now he is a better preacher and I feel that may be that he would have been deeply successful in that field, but Ernest is still a very competent lawyer and I'm sincere when I say it.

I agree with the last statement counsel made about O'Connor about going back to New York. God knows, I wish he would have stayed there and not come down here to start off with. For what purpose he came down here for, you can only imagine and assume. Counsel said let him go back to New York, let him say in Ocala, Florida, there are men of justice there. I presume that he is a white man. I presume he must have had some reason to join these so called "freedom riders". I presume he had nothing to establish as the facilities of the bus station in any place was non discriminatory as far as he is concerned, so he is going to set himself up in some manner to come down here to tell you to tell the nigger population down here what he wants you to do. Well, let me tell you something. In Marion County, Florida, I like some of you born here, five blocks across the street from this bus station, weighed thirteen pounds and ten ounces when I was born, right across the street, right there, been here all my life and I would put our negro population in Marion County up against anyone in the world and you take that back to New York, Mr. O'Connor. We have the finest group here and they here don't need him to come down here to interfere with any relationship, which the races may have between himself here, are you some almighty, is he some disciple leading a movement in Ocala, Florida.

Let me tell you something about this case. Let's start with Unlawful Assembly. What are we charging this man with? We charge him in this Affidavit with Unlawful Assembly. You know for awhile I felt pretty good. Counsel was building that Prosecuting Attorney up and I felt like I was a pretty important figure in this county. It got up so high, and I thought about that seventeen dollars and ninety-four cents a day you all pay me, and it sure dropped down. I thought, boy it sure sounded pretty good until I thought about my seventeen dollars and ninety-four cents a day. We say the State of Florida does this and this is what we say about this New York disciple. "On the 16th day of the month of June, 1961, one James Richard O'Connor did unlawfully meet with two other persons, names to-wit: one Herbert Ebenezer Callender and Leslie Lee Smith to commit a breach of peace." That is the charge.

Now, we go into Unlawful Assembly. Counsel read you pretty well the charge, let's go over that. One thing that is wrong, counsel certainly didn't intend to, it may sound this way to me. It is not dealing with three or more people, a total of three consitutes this offense. We say three, he, Callender and Smith, that's three. Unlawful Assembly and let's discet this and apply the facts to it is defined as a meeting or gathering of persons, three or more. We have a meeting, yes, at the Greyhound bus terminal at the West door in Ocala, Florida. Three or more persons, yes, Callender, Smith and O'Connor. That far we will take. Let's go, with a common intent, here is the gist with a common intent formed before, before they met now or at the time during the meeting. Now, let's go into that. I submit to you that he along with Callender and along with Smith where ever these "freedom riders" left from had designated Ocala, Florida as a source of trouble created and inspired by them, you say whoa" What do you base that on? Callender got off that bus with a camera. Why do you think for one minute he got off that bus and went in this West door, where this trouble was created with a camera? Counsel says whoa! he didn't get in the West door, no sir, he tried to get out the West door. He worked hard, he pulled, but he ain't got him out yet. Geiger put him inside, and Mr. Geiger put him in the tussle. Mr. Willis put him coming out the door and the only thing Owens said negatively, I did not see him inside. I can not swear he was there, but with the group of people surrounded and there was testimony of more than twenty-five people in that bus station at that time, and I can not swear that he was in there. Don't you think that man with that camera wasn't in there? That was the purpose, he was in there. Now, we are going to set this thing up. We get off the bus at Ocala. I'll tell you why he was dropped behind though, and that was because he had that camera and this was deliberate, this was as premeditated as that mustash on his face that they were going to create trouble and a scene in Ocala, because Callender with his camera did stay behind. He stayed behind to take a picture, so he could send it back to some great Northern newspaper to raise almighty of his call whatever it may be and he had that camera and to try to create an instance, they did their best, what happened? A man here in Ocala is coming out the door. Now, you do have a conflict and I can tell you what to do now. I'll let anybody create a disturbance in this CourtRoom, and I'll ask all six of you individually to tell me what happened and you will come up with six different things that happened in this Court Room.

To begin with, we had a shoving contest, that makes sense. The scene was created when O'Connor pushed or shoved Owens, this is eronic and you noticed all the tesitmony was, he was trying to get around in this manner. Going to his left with a camera angle sitting here, so he could get his face as the so called Reverend, and I mean so called Reverend Smith's face into that picture. The intent and purpose when they left New York was and it is obvious why Ocala, if you will stop and think about it. In my mind it is obvious why Ocala was picked. Do you know one of the reasons why? I suspect up North there is a feud. They don't understand how we have been able to maintain relationship between the races of the highest degree of feelings throughout the years and years and years. They still wonder and they are stunned why many occasions, which may have created racial riots both in New York City, Chicago, Jacksonville, Florida, counsel's back yard right last year, yes, violence, shooting, your own back yard, counselor? They said, why, what is this secret that they possess in Marion County? Well, I will tell you, and I at this time can speak for my office, I have some knowledge of the operation of this Court, from operations of the Sheriff's office, if you want to call it a secret, I think it is because of the best treatment and application of the law to all people. I have tried in this Court Room white doctors, white dentists, even Prosecuting Attorneys from adjoining counties in this Court Room. When they walk through that door to me, they ain't no different, if they have got a million bucks in their pocket, or if they have got a dollar. When they sit on that side of the table, the law is going to be applicable to them, be they rich or poor, it don't make a cotton picking difference to me. I can stand prejudice, because this seventeen dollars and ninety-four cents a day ain't going to make or break me at all, because I stand that, and I figure the secret is the treatment, and I am going to tell you something that I said before and I am going to say it again. This year thus far and this is another thing, back in New York, O'Connor, he going to make a note in that little book he keeps in his book, he keeps in his pocket and you can take it back up there with you. Eight negros have been tried in this Court this year without attorneys and I am sitting here with an all white Jury pounding and pounding and seven of the eight were accquitted, found not guilty. That Jury took the case on the facts and the Jury come back and they rendered the verdict, but that is what they don't understand. Be it a murder of the high sheriff, nothing, no hesitance, nothing. They don't understand the high Sheriff that is murdered and no violence, they say, what is going on in Marion County? What is the secret? I say this, because he along with the other two was determined to hit Ocala and find out what happened. Do you know what he found? He found that the law in Ocala is applicable to every person regardless of where he is from, or the color of his skin. He comes to trial, if he violates it and if he don't, he don't. Don't you know how this thing happened? Mr. Geiger came up there and Sheriff Willis had then told these three white people to get, buddy, they got. They had a little help, too. Mr. Geiger grabbed Owens by his arm and pushed him out of the station and say get, because they knew if they didn't get, they would be sitting right here and right there in his place, and one of them started coming back, and the Deputy said take him, get him across that street. Now, in an effort to extend to the same person, not once, twice or three times, but six times, would you please get back on the bus?

MR. JACKSON: I object Your Honor, that is not in evidence in this case.

MR. MUSLEH: The officer said three times before and three times afterwards on Cross Examination of H.A. Geiger.

MR. JACKSON: It is not in evidence, Your Honor.

THE COURT: I understand that was part of the testimony.

MR. MUSLEH: He said get back on that bus, we don't want no trouble here. We don't want to arrest nobody. Oh, they weren't satisified, let me tell you. Already that morning, already, we have a group of so called "freedom riders" come in, they go in the Greyhound Bus Station, they use all of the facilities, nothing. This is the second group, but these three, I say conspired, because the testimony Mr. Geiger told us, two of the three of the "freedom riders" even went in the bus station, still used the facilities, still caused no trouble, and in addition to that, two more times during the day, two more groups of "freedom riders" came in to the Greyhound Bus Station and used the facilities, but with no trouble. Who were they hunting for? You go back to New York and you tell them this. That with all of your education and all your brilliance as a member of the great state of New York the law will apply to you just like it does to anyone else, you tell them that. You tell them that you are not going to come and step on any person and clothe yourself, because I am from New York, the law is applicable to me. For what more person could have been extended, what more courtesy could have been extended to you by the officers in six separate occasions asking you to get on the bus, because why, the officers said there was still apprehension that there may be trouble. You remember they put Mr. Penuel over here, a nice spot. He was one of the ones and he was the man who when he saw these men didn't leave the place pursuant to the officers' orders went back and was headed back to them when Sheriff Willis told the deputy to assist him, get back across the street and stay there, so the apprehension was still there and because of that he told them to leave and even in view of that fact after this happened, two more riders got off the bus, walked peaceably into the place, walked peaceably into the cafeteria, sat in the cafeteria, used the toilet, the ladies' toilet walked out, got on the bus and nothing happened.

I'll tell you something, they intended from the time they met until the time they got here and did This statement of counselor here had to be treated with humor, and I'm sure he was sincere, but I have got to treat it with humor. I don't feel that he even meant it. Today he says the law applies a great deal to Mr. O'Connor. That same law didn't apply to Mr. O'Connor on June 16th. That same law didn't apply to the people, who disbursed when the officers said disburse. Does he come into Court and say he is bigger than the book? The book says what the law is. This don't apply to me, you know why, because some place in these pages it says exemption "freedom riders". Everybody else it applies to, but exemption "freedom riders". From, free from what? You heard the testimony in this Court, they come and told counsel to test the facilities, they was wrong, they are about eleven months late in testing the facilities in Ocala. As Mr. Geiger testified the facilities had been used by all parties long before he ever decided to come to Ocala. If he wanted to, and he, this disciple, disciple of what, I don't know, but this disciple, he should have inquired of the local citizens in this county as to any conditions that existed, but he wanted to place himself high on a pedestal to be the great leader to come down and say to these people --- Let me tell you something --- These people that go up North and teach you alot of things about leadership and citizenship and I'll tell you this and you got a long way to go before you, Mr. O'Connor, even to sit as a peer to the negro citizens of Marion County. You have got a long way to go.

There has been a lot made by counsel here about Mr. Owen's testimony. He didn't observe Callender, Callender, that's the one with the big camera. Say, he don't go inside to take a picture of the bus station, because he wanted to take the picture back to New York of the Ocala Bus Station, you can just visualize him wanting to take a picture of the Ocala Bus Station inside. He says, here is Owens, the man most involved according to counsel. I don't agree what he says.

You know during World War II, I believe it would be true today, these flying missions in a single engine plane, you carry an observer along with the pilot. He has his duty to perform, because an observer is free from the duties of flying the plane and the various instruments that control the plane and he can perform the job he is assigned to observing the terrain and make those concentrations of any enemy battles and so forth, so the assignments that are difficult of that pilot is busy with his gadgets and his rutters and so forth. Now, I say this, H.A. Geiger or any officer that had theopportunity to observe this incident was in a better position to say what happened than a person who was involved in it, his self. For this person couldn't even tell you who was in back, who was in front, or what happened, because Mr. Geiger was watching for, he had been down there and he had been told to look for, and he told you what had happened. He was in a much better position. He and Doug Willis, he was in front of Doug, because Doug was at theSouth door when it happened, which is in this neighborhood on Monroe Street and then around to the West door here., so that's the law and they say, a tussle.

I have sat on this side of the table many a year counsel. When you ain't got no defense, I use the word ain't, then, it is a perfectly good word, that's a fine word --- When you ain't got a defense, always attempt to muddy up the Prosecutor's case.

I go up to Silver Springs, I go out in the glass bottom boats and I look down and I see two hundred feet to the bottom, beautiful, clear, crystal clear water. Put some mud in there and you don't see to the bottom, so when the defense hasn't got a case, start telling the Jury about the Prosecutor's case, always convict the Prosecutor, that'sthe first thing, convict him, get rid of him, then get rid of the Sheriff, that is number two. Then, start telling the Jury what the Prosecutor is going to say to minimize it. Then, start with the State's testimony and you can come out pretty good, sometimes. There is actually no conflict in this testimony. To boil it down, you have been here a long time, and I would like to go, too. I have got to go to Miami tonight, but I'm not leaving until this case is done and it is done in the right fashion according to my way of thinking. It is going to be handled right and I'm not going to rush it up, either, but to my way of thinking his defense is this. There was no Unlawful Assembly, because a fight had not actually broken out. Ernest Jackson, Sr., make up your mind. In Birmingham, Alabama, your protest laws, theofficers sat by and let them fight. They now holler that the officer sat by and didn't let them fight, they should have let them fought. You are going to do one way or another. You either want it, or you don't. When you let them fight, that's a big complaint. When they break it up, that's equally a big complaint. You are talking about the laws, you are asking for your cake and eat it too, and a little icing and ice cream on the side. Some place you have got to cover the middle ground.

I am amused again at one statement made my counsel about the Supreme Court, Appelant Court and all that, the laws of the people. I question what group the Supreme Court belongs to.

I think the Communist party of this country has more pull than anyone else. Who does it belong to? Well, according to the books it belongs to the people, but to read a decision whether and where the Communist party has been reversed--- To read a decision here less than two months ago where they outlawed they have to disclose their membership, then you see where the Communist party says no we defy the United States Government, we are not going to give you our membership list, then you see the same Judge, who wrote that opinion issues a stay of execution and tells the world, that we are not going to enforce this right now, we are going to wait a little while. You ask me about it, and you say the Supreme Court is the peoples' court, who does it belong to? That is a good question.

Gentlemen, I have nothing more to say. You have sat here and you have listened to it. Our case is simple and I am going to read you this piece right here and let the great orator here get up on the podium here and cut loose. He is going to tear it down piece by piece. Unlawful Assembly is defined as a meeting or gathering of persons three or more, which you have had here with a common intent formed before or at anytime during the meeting. They could have formed their intent inside the West door. We say they had the intent before when they got off that bus when Callender got that camera, when he had that camera angled. They knew what they were doing. This guy here here is a sharp person. He knew what he was doing. With a common intent formed before or at anytime during the meeting to mutually associate one another in the execution of a common purpose. They had a common purpose. They created this incident, they succeded, they succeded in having all the big Northern newspapers and the televisions condemn Ocala, Florida. They got what they wanted. They got the press from it. They got their deal. They got exactly what they wanted, and they got Ocala with it, and I'm sorry they picked Ocala, but they did. Lawful or Unlawful, it was lawful for them to go in the station, there was nothing wrong going in the station, the facilities are I.C.C., and that part was lawful. That is all I have to say, thank you.

MR. JACKSON:

May it please the Court, Mr. Musleh, gentlemen of the Jury, it is my privilege to talk to you again. This is the rules of procedure. Of course, Mr. Musleh will not be able to come back and answer this particular argument that I have. In all fairness to him, I am not going to talk about anything other than what he has already said, so I will just answer him.

Gentlemen, every case in court is a service case, because it affects one of the citizens, either you or somebody else and of course the purpose of the Prosecution is to try to prosecute you, and the purpose of the Defense is to try to defend you. The purpose of the Jury is to resolve that conflict and go by the law and the evidence in this case.

Now, much of what I have said was not evidence and much of what Mr. Musleh was not evidence. For that reason the Court instructs you that our arguments are not to be weighed by you as evidence. I made that particular mention to you, because number one, there was no one testified in this Court from this stand that Mr. O'Connor set himself up as a phrofet. That he came down here to push something down your throat, not one witness testified to that. You said that when you became Jurors that you would try this case solely on the basis of the evidence from this particular witness stand, not from the newspaper clippings, not from what other people have said. You didn't hear one witness testify from this stand, Mr. O'Connor attempted to set himself up as a God or that he came down here to do anything to anybody, not one individual said that, and that the only Ocala man that testified in connection with this thing and the most interested person in this thing was Mr. Owens and even Mr. Owens had to admit that he was telling this man to come on.

Now, the Prosecution has said that you look to the man who is able to observe and try to get this picture, he gave you a beautiful demonstration of an observation looking down on a scene. You remember this "x" here. That "x" represented the position to which Officer Geiger was standing when he first noticed what happened over there. He was back six or eight feet over here when it was supposed to have started, the Sheriff was back over here. Now, surely that was not overlooking nothing. In addition to that, Mr. Geiger was looking at the back of Mr. Owens and that people were all around out here, how could he see?

Mr. Owens was trying to be fair about this thing. He said that he saw Callender out here when he came out of the door. How did he get out there? He said this all happened within a very short period of time. Now, the Prosecution said, this is a typical way by which you can set up a good shot and a good scene, but Mr. O'Connor here planned the whole thing and that is why Calleneder was back with his camera, indirectly, I would say, he was trying to get on back, which was where he was and would have put him out here. Then, he said while he was there, he was there taking pictures. Do you mean to tell me that Mr. O'Connor coming in on a bus first time in there could have planned with Mr. Owens to be there in that spot? There has been no showing there was some kind of agreement with Mr. Owens and Mr. O'Connor to do this, but he is such a mathmatician of great mind that he could have depicted a head of time way up the line that Mr. Owens and you are supposed to find that to be true, so help you God. That has to be true beyond any reasonable doubt in your mind, because if you have a doubt, you must dissolve it in favor of the Defendant. Now, can you find that to be the truth, and if you convict this Defendant, that is what you will be saying.

The next thing, he said he was to take pictures to show what the people were doing, of what the people in Ocala would be doing to him and to others. In Ocala, according to the Prosecution, according to the Sheriff, there was nothing they could do but go in and use the facilities, they had been using all the time. There was nothing there to do to be expected. Now, you got on a bus in Ocala and you went from here to New York, you would expect to get off the bus to go and use any facilities that other people were using there. Would you be compensated, anybody doing anything to you and you might bump into somebody, accidentally, when was the last time you bumped into somebody? You never in your life bumped into anybody? No one has ever bumped into you? I'm positive that each of you gentlemen have been, somebody has bumped in to you and you have bumped into them. There is nothing unusual about that. Now, it could have been that Mr. Owens got a little angry, because he bumped into him. Mr. Owens even said he wasn't concerned about where he went in the place. He was concerned about him bumping into him and that was all, and Mr. Owens also said that Mr. Smith was backing up with him. There could be no fight unless they clashed. They were backing up and they were in the process of being pushed out when this took place. Now, that was the officers doing that. They were not a part of the so called assembly.

The Prosecution would have you to say that was the Unlawful Assembly. The Defendant is not being tried gentlemen, for stepping on Mr. Owen's foot, because he didn't step on his foot. He is not being tried for that. He is being charged with assembling illegally. To do something to someone else. Now, has the Prosecution showed you someone else's rights he has tried to do something to? He never said that. He showed this to you, but you, but you as a Juror that to find that under oath, they didn't show it to you, can you under your oath that Mr. Owens, the Sheriff, Mr. Geiger, don't you think as much of your oath as they do?

The Prosecution stated that he tried eight or nine cases and eight of them were accquited, because the reason is that six men stood on their feet and rulled as they saw the evidence and that is what I have been talking about all day. Now, there is no other reason to rule in those cases as there is in this case. I agree that you are under a greater pressure however, and you know why and I know why, but is there any reason why you not standing on your feet and ruling as you see the evidence? You promised me that and you promised it under your oath, and what good is an oath. That is the back bone of our Court. The word of a man is what makes this nation stick. The dollar bill in your pocket, fifty cents or a quarter, whatever you have is simply on the promise that you can get something with that amount. When we start believing and want another, that dollar would be of no value. Someone would like to destroy us that way. They would like to destroy everything you do.

Now, the Prosecution has also said to you gentlemen, he read all of the instruction like theCourt is going to give to you. He read it all the way through. In the end, he cut it short. I didn't say he did it deliberately. He was finished and that is where he wanted to stop, but I do think you should perhaps further examine the end of this instruction. It is not necessary to this affect that the design or purpose be executed, but it is necessary that the Defendant and the other persons named in the Affidavit attempted or planned to use force to obtain their purpose. Now, as you have been deomonstrated by someone any act of threatening to obtain the purpose? Who did he threaten? Mr. O'Connor --- I mean Mr. Owens said Mr. O'Connor didn't say anything to him. Who then? He told the other man, come on, this way to the cafeteria. What threat was he trying to do, but that is the law of the State of Florida that you are to take into conclusion as Jurors. It is necessary that the Defendant and others named in that Affidavit attempt to tend to use force to obtain their purpose. In other words, that would be a necessary part of the charge. To obtain what purpose?

Now, the Court is going to instruct you gentlemen that the Defendant, Mr. O'Connor has been charged with failing to obey an officer. That is not part of this charge. It is what he did on his own that he is charged with. Now, failing to obey an officer is another charge and it is not even a part of this Affadavit, so if you find that the officer caused O'Connor to move, and he didn't move, that is no basis for finding him guilty for this charge, because that is not a part of this charge. The Court will instruct you in connection with that point of view and you must follow the law. When you take that out of this case, what do you have left? Think of it. It was in your mind and the officer told him to move, to get on the bus and he didn't get on the bus, so therefore we will find him guilty. Well, we concede that he told him to get on the bus and he didn't get on the bus, because that is not a part of the case at all and you can not find him guilty under the laws simply because that happened. The only thing the Defendant said here was I would like to go to the restaurant and eat, that is all. Was that he done illegal? What would you have said, if you got off a bus in New Jersey, New York, Chicago, any place, and when you got off the bus, you would expect to go and use whatever your needs required you to use. If any person walked up and told you you couldn't use them, you would go to the police and tell him these people wouldn't leave you along, because I only want to eat, and the law regardless if you are from Ocala or in New York, Chicago, any other place stand make them leave you alone. They don't push you around and better not push you alone push you around in New York, Chicago, Washington, or any other place, because you are a citizen of these United States and that is the protection you have when you go from town to town. Now, can you in Ocala say, we are not going to reciprocate and protect every man that come in our town? Mr. Geiger said we protect people that live here, and we protect those that come here, that's all. Can Ocala say anything different on that? Gentlemen, just as the Prosecution said we have brought eight cases here, and the Jury stood up on their feet and did what they were supposed to do and I assume you will do that in this case and I know it is not going to be easy for you to do that. I know that. I can not impress upon you how much I know that, but I can impress upon you how much I must feel when I say I believe and I do believe that I can go down in any part of America and find justice with the people that live there. I just believe that, and I won't stop believing that and when you tell me that is not true, and I will answer Russia anybody else, too that says otherwise that is different.

I lost my blood in France and Europe. I walk lame now because I wouldn't let no man say he has a right to dictate to me, to you, my children, yours, and if I thought anything was different from that, I would try to do something about it. I wouldn't be a lawyer, I would quit, that's what I would do, because I represent the State of Florida as a lawyer, the United States as a lawyer, and my reputation of what I do as a lawyer. I represent the country I am in and I am not going to let that representation be nothing but high. I can't help it, because I am black. I certainly can help it, if your principals our right. I was born this way. Surely, I like any other man can do what is right, that is all I am asking you. That is all I expect. I hope and I pray that you will not convict Mr. O'Connor, because he is from New York. I hope that you won't convict him, because he has been accused of being a "freedom rider," whether he is or not, and he --- it has not been testified from this stand that he is. I hope that you will talk about that. The fact that he got off that bus and came in with all of the other passengers, but do you want to push him over in that group, or that group or this group with no evidence here. Can you do that? In your minds, you say you do know, but do you know that from this stand, then if you don't know from this stand, you only think it. You were thinking about what you read in the papers, about what other people have said, but you promised that you would convict him from the evidence from this stand. Are you going to stick by that? That is all I ask you. I place that faith in you to abide by.

When I close, the Court is going to instruct you the law. When the Court reads you the law, I hope you try to pay attention to it and when he reads this about what Unlawful Assmebly is, I hope you understand, that is not only be assembly of free, that it must be intented to do an act, an intent to use force, and injure the rights of others, help others. It may be in your mind, well, the fact that he came here, he was trying to do something to my rights, but you said that would not be in your determination. You would go by the evidence from this particular stand. There is no proof that he tried to anything to anybody other than told the man to get away. He didn't curse, I believe Sheriff Willis, I said, I asked him, was he talking in a loud voice, and he said, no. Was he shoving or pushing on anybody, and he said no. That is the Sheriff of this county that said that.

Now, the State put in these witnesses. They want you to disbelieve this witnessand believe the one over here. Well, if you are going to do that, gentlemen, then what are you going to say about your rights, how are there going to be rights? He said that two people were there and they talked very loud, well, tell you, or tell me, you were not there, how can you see it differently than anyone else? How can you say this is right, and I swear is right to my God. That is what you have got to do to vote to convict this Defendant, but the Prosecution said Mr. Owens was right there, but Mr. Owens isn't going to tell you that. Now, should you say it? I tell you gentlemen, I feel as much for my oath as any other man, if he would not takethis stand and say under oath thathe knew this to happen, I certainly wouldn't take under oath, I swear by my God I know this happened, and you promised that if you couldn't say it, you had any reason to doubt, you would vote to accquitehim, this Defendant.

Now, I know the Prosecution has attempted to try to say when the Defense doesn't have a defense they try to muddy the water to keep you from seeing it, but they didn't tell you the other part of it. If the Prosecution don't have any prosecution, they try to get your mind off prosecuting the man for Unlawful Assembly and prosecute him from coming from New York and because he came down here. He will prosecute him for that. You are sworn not to try him, because he came from New York, not he came down here, not that he attempted to go in and eat, but that he was there in an Unlawful Assembly, so he says you can't try that, anyway, find him guilty. That is not America, never will be America, and you wouldn't accept it, and your children are not going to accept it, and I will never accept it. I will always stand up for what is right no matter what no body says, even if you vote to convict Mr. O'Connor, then are you going to stand up for what is right tomorrow? I only hope you will do what I know is right because you are going to be the one to teach your children right from wrong. Thank you.

THE COURT'S CHARGE:

Gentlemen of the Jury, this is the case of the Stateoof Florida versus James Richard O'Connor in which it is charged that on the 16th day of the month of June, 1961, in Marion County, Florida, one James Richard O'Connor did unlawfully meet with two other people to-wit: Herbert Ebenezer Callender and Leslie Lee Smith to commit abreach of the peace contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Florida.

You have now heard the evidence in this case, and the arguments of the attorneys. It remains for me to give you in charge the law, which applies to this case. It is your duty to accept the law as I define it to you and to apply it to the evidence as you have heard it from the witness stand.

The Defendant is presumed to be innocent and such presumption remains with him and abides with him throughout the every stage of the trial unless and until it is removed to your satisfaction by competent evidence beyond a reasonable doubt.

The Defendant is entitled to the benefit of every reasonable doubt, which may arrise from your minds and the evidece or lack of evidence in the case. You can not convict him of the crime charged unless you are satisfied of his guilt beyond a reasonable doubt.

A reasonable doubt is defined to be that state of a Juror's mind where after heard and carefully considered all of the evidence, he can not say that he has an abiding conviction to a moral certainity of the guilt of the accused. Such doubt however must as its name implies be a doubt that is reasonable. One which reasonable men would entertain after fully considering all the evidence and one which arrises from the evidence or lack of evidence in the case, and not a mere possible or speculative doubt.

It is incumbent upon the State to prove to your satisfaction by competent evidence beyond a reasonable doubt every material allegation in the Affidavit before you can convict this Defendant of the crime charged.

You are the sole judges of the testimony and the creditablity of the witnesses. It is your duty if you can to reconcile all of the testimony without imputing to any witness a want of truthfulness, but in considering and weighing the testimony of the witnesses and each of them, you have the right to take into consideration their manner of testifying, their interest if any in the subject testified about, and to believe or disbelieve any or all such testimony according to what you believe is worthy of belief.

The numbers of witnesses does not control the Jury's verdict. You may believe or disbelieve one against many, or believe or disbelieve many against one. You are to decide this case on the creditabity of the witnesses and taken into consideration their manner of testifying, tthsir attitude and conduct upon the stand and their interest if any to the subject testified about.

Under the law no accused person shall be compelled to give testimony against himself. An accused failure to give testimony shall not be used against him, or should his failure to give testimony be considered by you. You should consider this case solely upon the evidence produced from the witness stand.

The section of law involved in Section 870.02 of the Florida Statutes, which reads as follows: If three or more persons meet together to commit a breach of the lpeace or do any other unlawful acts, each of them shallbbe punished by imprisonment not exceeding six months or by a fine not exceeding $500.00.

Unlawful Assembly is defined to be a meeting or a gathering of persons three or more with the common intent formed before or at anytime during the meeting to mutually associate one another in the execution of a common purpose lawful or unlawful which would interfere with the rights of others by committing such acts of intimidation or disorder as would likely to produce danger to the tranquility and peace of the neighborhood and have an natural tendancy to cause rational, sane, firm and courageious person within the neighborhood, the vicinity to apprehend a breach of the peace. It is not necessary for this offense that the design or purpose be executed or put into execution, but it is necessary that the Defendant and the other persons named in the Affidavit attempt or threaten to use force to obtain their purpose.

The Court further instructs you upon the question of intent on the part of the Defendant that the law presumes that every person intends a natural and ordinary consequences of his act. Wrongful acts knowingly or intentionally committed generally can not be justified on the ground of innocent intent. Ordinarily the intent which one does a criminal act is not proclaimed by him. Ordinarily there is no direct evidence on which a Jury may be satisfied from declarations of the Defendant himself as to what he intended to do when he did a certain act. In this question of intent like all other questions of fact is solely for the Jury to determine from the evidence in the case. Previous accquaintance between the Defendant and the others named is not necessary nor is it necessary that each person named in the Affidavit should have seen the others or have knowledge as to all the members of the common purpose were. It is not essential that the parties meet or that they confer or formulate their plan, nor that the Defendant and others named have knowledge of the scope of the purpose or the means by which the purpose is be accomplished, nor at anytime shall have been set for the accomplishment of the design. Neither is it necessary that the plan of combination shall embrace in detail in its early stages the various means by which it is to be executed as it is sufficient there is a general plan to accomplish the results sought by such means as they may from time to time be founded expedient.

Unoawful Assembly implies consert of design and not participation in every detail of execution and it in not necessary that every person named in the Affidavit should have taken part in every act or know the exact part performed to be performed by the others in the furtherance of the purpose.

The Court further charges you that before you may convict the Defendant that neither any of them on the crime of Unlawful Asembly, the evidence must convince you and each of you beyond and to the exclusion of every reasonable doubt they, the Defendant actively and intentionally participated in the Unlawful Assembly alleged. The mere knowledge, acquiesce of the alleged purpose without cooperation or agreement to cooperate is not enough constitute one a party to alleged Unlawful Assembly. It is not necessarily however that the State show that each person named participated in each and every essential act or element embraced within the purpose, but you must believe fromt the evidence that each person named actively and knowingly participated in the furtherance of the common design as a whole.

You are further charged that under the laws of Florida, it is not necessary to state in the prosecution of Unlawful Assembly case either to allege in the Information or to prove at the charge any overt act, or to prove at the trial any overt act. You will therefore be warranted in returning a verdict of guilty, if you find from the evidence in the case that Unlawful Assembly of three or more was established in your minds beyond a reasonable doubt whether or not any overt act was ever committed by any of the persons named.

The Court further instructs you that the Defendant is not on trial for failing to obey an officer. Failing to obey an officer is not a part of this crime for which he is now on trial, to-wit: Unlawful Assembly.

Section 30.15 reads as follows: Sheriffs in their respective counties in person or by deputy shall be conservators of the peace in their counties. Suppress tumults, riots, and unlawful assemblies in their counties with force and strong hand when necessary. Apprehend, without warrant, any person disturbing the peace, and carry him before the proper judicial officer, that further proceedings may be had against him according to law.

The Court further instructs you that if you find the Defendant is an interstate passenger traveling on a bus that stopped at a regular bus terminal and if you find that the Defendant was in the process of using the facilities of said bus terminal in an orderly non violent manner and there were no acts of intimidation and disorder as are likely to produce danger to the tranquility and peace of the nation and neighborhood and had a natural tendancy to cause rational, sane and firm courageous persons in the vicinity to apprehend a breach of the peace, then you must find the Defendant not guilty.

Now, if you find the Defendant guilty, the form of your verdict will be, we the Jury find the Defendant guilty as charged so say we all.

If you find the Defendant not guilty, the form of your verdict will be, we the Jury find the Defendant not guilty, so say we all. In either event, the verdict shall be signed by one of your number as foreman.

You may now retire to the Jury room and select your foreman and consider your verdict.

WHEREUPON, the Jury retired from the Court Room at 3:45.

WHEREUPON, the Jury returned to the Court Room at 4:15.

THE COURT: Do you have a question with regard to the charge, is that correct?

THE JUROR: Yes sir.

THE COURT: What part would that be?

THE JUROR: Your Honor, we were in question as to the part of this law governing this particular case as to how far the Defendant had to go to commit an act of breaking the law.

THE COURT: All right sir, let me read you the Section 870.02, Florida Statutes. If three, or more persons meet together to commit a breach of the peace, or to do any other unlawful act, each of them shall be punished by imprisonment not exceeding six months, or by fine not exceeding five hundred dollars. Unlawful Assembly is defined as a meeting or a gathering of persons three or more with the common intent formed before or at anytime during the meeting to mutually associate one another in the execution of a common purpose, lawful or unlawful, which wouldinterfere with the rights of others by committing such acts of intimidation and disorder, which are likely to produce danger to the tranquility and peace of the neighborhood and have a natural tendancy to cause rational, sane, firm and courageous persons in the neighborhood to apprehend a breach of the peace. It is not necessary to this offense that the design or purpose be executed or put into execution, but it is necessary that the Defendant and the other persons named in the Affidavit attempt or threatened to use force to obtain that purpose. The Court can allow you to carry the instructions into the Jury Room with you, if you like?

MR. MUSLEH: It is all right with me, is it all right with counsel?

MR. JACKSON: It is all right, Your Honor.

WHEREUPON, the instructions of the Court were given to the Jury.

WHEREUPON, the Jury retired to the Jury Room at 4:20 P.M., to consider the verdict.

WHEREUPON, the Jury returned to the Court Room at 5:15 P.M..

WHEREUPON, that ended the trial.

CERTIFICATE

STATE OF FLORIDA)
)
COUNTY OF LAKE)

I, Joan E. Tobey, Deputy Official Court Reporter, do hereby certify that I was authorized to and did report stenographically the testimony in the case of

State of Florida versus James Richard O'Connor

and the above and foregoing pages numbered one to 122 is a true and correct transcript of the said testimony and proceedings.

IN WITNESS WHEREOF, I set my hand, this 7th day of August, A.D., 1961.

/S/ Joan E. Tobey
Deputy Official Court Reporter,
Fifth Judicial Circuit.

Mss
546 SEDFRE

Callendar et al vs Florida, July, 1961 - March, 1966 (Con't)
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DISTRICT COURT OF APPEAL
OF FLORIDA
FIRST DISTRICT

HERBERT EBENEZER CALLENDAR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

TRANSCRIPT OF TESTIMONY
VOLUME II

PETITION FOR WRIT OF CERTIORARI

TO: THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND FOR MARION COUNTY, FLORIDA

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For Respondent.

IN THE COUNTY JUDGE'S COURT,
IN AND FOR MARION COUNTY.
FLORIDA.

STATE OF FLORIDA,)
Plaintiff,)
- vs -)
HERBERT EBENEZER CALLENDAR,)
Defendant.)

TRANSCRIPT OF TESTIMONY

APPEARANCES:

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IN THE COUNTY JUDGE'S COURT, IN AND
FOR MARION COUNTY, FLORIDA.

STATE OF FLORIDA,)
:
Plaintiff,)
:
-vs-)
:
HERBERT EBNEZER CALLENDAR,)
:
Defendant)
:

TRANSCRIPT OF TESTIMONY

At a trial of the case of STATE OF FLORIDA, versus HERBERT EBNEZER CALLENDAR, held on the 21st day of August 1961 before the Hon. Lewis O. Myers, County Judge, In Ocala, Florida, and a jury, the following testimony was introduced.

Before a jury was duly accepted and sworn the following proceedings were had:

Mr. Musleh: YOUR HONOR, there has been filed and argued two motions to quash and that's in the case of James Richard O'Connor and Leslie Lee Smith, Now, It's my understanding it's the Court's ruling - the Court is going to reserve ruling at this time on the motions to quash, is that right, sir?

THE COURT: That is right.

MR. MUSLEH: And that reservation is pending the outcome of the appeals in the case?

THE COURT: Yes, sir.

MR. MUSLEH: Now , as I understand, counsel is willing to stipulate and waive any technicality by way of objections he may have as to the delay in prosecution simply in reference to the three term of court rule, is that correct?

MR. JACKSON: That's correct. Your Honor, it would be all right to say that those cases are stayed until a ruling has been made by the Appellate Court.

MR. MUSLEH: That's all right.

THE COURT: One of your grounds is that they have been convicted and until the Appellate ruling is handed down this case isn't concluded yet.

MR. MUSLEH: All right, but this is prior to the Appellate ruling, is that right?

THE COURT: That's right.

MR. MUSLEH: I noticed you headed it "United States Supreme Court", so we can figure two years, can't we?

MR. JACKSON: I hope not, sir, but there's a possibility of it.

MR. MUSLEH: I hope you have to make the trip all the way up there. Let's have the defenant come up to the table here.

(Mr. Jackson calling the defendant up to counsel table.)

(The Court then proceeded to call the jury up to the jury bar for examination. Thereupon the jury was duly accepted and sworn in at 2:25 P. M.)

MR. MUSLEH: Your Honor, please, this is a list of the State's witnesses, going down the line, T. W. Penuel, J. A. Windor, John H. Owens, H. A. Geiger, Doug Willis, Keith Ownes, who is not in the courtroom at the present time, but is on a call, and when he reports to the courtroom I'll then inform counsel and the Court so that the Court can qualify him before testifying.

THE COURT: I ask now of counsel for the defendant the names of his witnesses.

MR. JACKSON We have none, your Honor.

THE COURT: Youire being placed under the rule which means you are to remain outside of hearing distance and within calling distance of the courtroom, You will not discuss the testimony that you are to give, or have given in this matter, with anyone, other than the prosecuting attorney and the attorney for the defendant. This rule pertains throughout the trial of this case until the arguments to the jury begin. The bailiff will inform you when you are able to return to the courtroom. The Court will swear you as witnesses at this time. Raise your right hand. You and each of you solemnly swear that the testimony that you shall give in this cause shall be the truth, the whole truth, so help you God?

(All state yes or nodded their heads)

All right, you may retire from the courtroom at this time.

MR. MUSLEH: Call Mr. Geiger, please.

MR. H. A. GEIGER, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. MR. MUSLEH: State your name, please.

A. H. A. GEIGER.

Q. And your profession or occupation.

A. Deputy Sheriff, Marion County.

Q. How long have you been employed as Deputy Sheriff of Marion County?

A. Since June 3rd of 1961.

Q. Do you hold any official position or title with the Sheriff's office other than Deputy Sheriff?

A. Chief Deputy.

Q. Prior to your employment with the Sheriff's office in 1961, did you have prior law enforcement experience?

A. Yes, sir.

Q. And where was that at, Mr. Geiger?

A. With the Ocala Police Department.

Q. And how long has that been?

A. Approximately five years.

Q. So all that you have had is approximately five and a half years of law enforcement experience, is that right?

A. Yes, sir.

Q. What educational background do you have, sir.

A. High school and complete two years of college, and about 12 hours in my third year of college.

Q. Are you a graduate of the Central Florida Junior College?

A. Yes, sir.

Q. You were with the first ones to graduate from there, were you not? .

A. Yes, sir.

Q. Mr Geiger, on the 16th day of the month of June, of 1961, did you see the defendant sitting here, Herbert Ebenezer Callendar?

A. I did.

Q. Where was that at?

A. Inside the Bus Station in Ocala.

Q What was the occasion for you to be there inside of the Bus Station in Ocala on that date?

A. We had had several groups of "Freedom Riders" traveling through Ocala and stopping at the Bus Station and we were there to prevent any trouble, any violence.

Q. Had you had prior notice as to the arrival of these so-called "Freedom Riders"?

A. I did.

Q. You were there in your official capacity as Deputy Sheriff for what reason?

A. To prevent any trouble.

Q. To prevent trouble?

A. Yes, sir.

Q. Do you know James Richard O'Connor?

A. I do.

Q. Do you know Lesley Lee Smith?

A. I do.

Q. Are they in this courtroom now?

A. Yes, sir.

Q. Can you point and identify those people?

A. Yes, sir.

Q. Would you do that, please, sir?

A. O'Connor is the man with the mustach and a light coat and Smith is sitting directly in front of him in a blue suit.

Q. That's Lesley Lee Smith you have pointed out, the person you identified, and also you identified a person as James Richard O'Connor?

A. Yes, sir.

Q. Did you see James Richard O'Connor and Lesley Lee Smith in the presence of and in the company with Herbert Ebenezer Callendar on June----

Mr. JACKSON: I object to that----

MR. MUSLEH: Wait, let me get through. --- on June the 16th of 1961 in the Bus Station in Ocala, Florida?

MR. JACKSON: Your Honor, I object to the question as being leading and ask that the witness be ordered not to answer that question, sir.

MR. MUSLEH: I asked him did he see him with them. What's leading about it?

MR. JACKSON: Your Honor, I think you can ask who he saw at the Bus Station and----

MR. MUSLEH: You want to prosecute the case for me?

THE COURT: Mr. Musleh, I think you might rephrase the question.

MR. MUSLEH: All right, your Honor.

Q Did you see the defendant, Herbert Ebenezer Callendar in the company of and in the presence with James Richard O'Connor and Lesley Lee Smith on June the 16th of 1961?

MR. JACKSON: I'm going to object again, your Honor, as that's leading.

THE COURT: Sustained.

Q. Did you see the defendant Herbert Ebenezer Callendar on June 16, 1961?

A. I did sir.

Q Did you see James Richard O'Connor on June 16, 1961?

A. I did.

Q. Did you see Lesley Lee Smith on June 16, 1961?

A. Yes, sir.

Q. Did you see them all three together?

A. Yes, sir.

Q. All right, where did you see the three of them together at?

A. The first time I seen them they were a few feet inside of the west door of the Bus Station located on North Magonlia Street, Ocala, Florida.

Q. Will you take a piece of chalk, please, and go up to the board and would you diagram, please, roughly, the Bus Station as best you can?

A. I will, if I can.

Q. All right.

(Witness drawing a sketch on the blackboard)

Q. Now, will you explain that diagram up there, please?

A. Well, this is the ticket office here. There's a baggage room here. This is the colored restaurant, the white restaurant, and the kitchen area, and this is the parking area for the buses here.

Q. Would you point and indicate with a chalk mark where you first saw these three people at the Bus Station, in what area?

A. Approximately in that location (pointing to the diagram).

Q. All right, will you return and take your seat, please? Mr. Geiger, what call your attention, if anything, to the presence of Herbert Ebenezer Callendar, James Richard O'Connor and Lesley Lee Smith at the time and place that you've indicated with your diagram?

A. I've still got that north direction wrong (refeering to the arrow pointing north on the blackboard).

Q. Well, change it and get it right, Mr. Geiger. Will you read the question back to him, please?

REPORTER: (repeats last question).

A. Some loud words first attracted my attention. I looked in this direction. I seen some shoving between a white person and a colored person just inside the west door of the Bus Station.

Q. Would you return to the board a minute, please, Mr. Geiger, and indicate by a chalk mark where you were when you first heard these loud words?

A. I was inside of the waiting room in practically that position (indicating on the diagram on the board).

Q. How many people were in the waiting room, approximately, at that time?

A. I would say at least 20, sir.

Q. Have a seat. From the position which you've indicated on the board where you were in the waiting room your testimony that you heard some commotion was at the position which you indicated that you saw the defendant Callendar, is that correct?

A. That's correct, sir.

Q. All right, now state to us exactly what you saw then and what did you do?

A. I looked over in that direction. I had heard the words and there was still some conversations----

Q. Now, excuse me for interrupting you. What words did you hear?

A. I can't recall, but something about "get out of here"or something. I don't recall the exact words.

Q. With your educational background, your background in law enforcement experience, did the words appear to be spoken in anger?

A. Yes, sir.

Q. They left you with that impression. All right, sir, now, proceed. Mr. Geiger. After you heard the loud words, from the point where you were there to the point where the defendant Callendar was there, what did you do?

A. Well, I proceeded over to this area and there was four white men and two colored men just inside the door. One of the white men and one of the colored men was in a scuffle. I seen pushing and shoving and I got to the area, I identified myself.

Q. You identified yourself in what manner?

A. I told them I was a Deputy Sheriff and to go outside. One of the person there, John Owen, did not know who I was and didn't accept the identification and I finally got him outside the door and the Sheriff told him who I was and he knew the Sheriff.

Q. Who did you get outside the door here?

A. John Owen, J. A. Penuel, the defendant, Herbert Callendar, Lesley Lee Smith, Richard O'Connor. I don't know whether I missed Windor.

Q. Well, Mr. Geiger, it's your testimony that everybody that you thought was involved in the fracas that you took outdoors, ordered them out?

A. Yes, sir. You see, there was three men with their backs to the door and there was three men facing the door, they were facing each other.

Q. Was Herbert Ebenezer Callender one of the three men involved in this group?

A. Yes, sir.

Q. Was he one with his back to the door or with his back toward the restaurant?

A. His back was to the door and he was on the south end of the other two men. There was - the men with their backs to the door, going from my right to left, there was Smith, O'Connor and Callendar.

Q. Callendar would be on the southern side, here?

A. Yes, sir.

Q. What was Callendar doing when you first saw him?

A. I couldn't say exactly what he was doing because it was Smith and Owen that was having the words when I arrived, and the shoving. All I knew is that they were all together they were in this group, there was a possibility of violence, there were several people at the Bus station and I wanted to get them outside so I could talk with them.

Q. Now, did you get the six people who were involved in this disturbance outside the Bus Station?

A. Yes, sir.

Q. What does this indicate on the drawing here?

A. That's the doorway.

Q. Did you take them out that door?

A. Yes, sir.

Q. Tell the jury, now, what you did, what you said when you got them out the door.

A. Well, outside the door - by that time I knew what the problem was - I advised Owen, Penuel and Windsor that they were local and to leave the area.

Q. They were local people. Were they white or colored?

A. I showed my identification. All three of those were white, sir.

Q. And what did you order them to do?

A. I ordered them to leave the Bus Station area.

Q. All right, now, that leaves us with O'Connor, Smith and Callendar. What did you do then?

A. I ordered them to get back on the bus and to remain there until the bus got ready to leave Ocala.

Q. Was there a bus parked there in that vicinity?

A. Yes, sir.

Q. Now, what happened when you asked them to remain there?

A. They refused to get on the bus.

Q. Did Callendar refuse to get on the bus?

A. Smith and O'Connor were primarily the spokemen.

He was with them, he went along with them.

Q. Did he get on the bus?

A. No, sir.

Q. Did he have anything in his hands?

A. He had a camera, sir.

Q. What type of camera?

A. Well, it looked like it had a case of plastic, color of red, a small camera.

Q. When you ordered all six of these people - four white, two colored - out of the west door, what did Callendar do physically with his camera?

A. Well, after I had ordered them about six times to get on the bus, and remain there, then I advised them that they were under arrest. The time that I advised them that they were under arrest, Callendar took the camera up to his eye to take a photograph of me.

Q. He aimed it at you?

A. Yes, sir.

Q. And what did you do then?

A. At that time I took the camera from him.

Q. How many times did you ask the defendant, sitting at counsel table, to get back on the bus?

A. At least six times after I told them that if they didn't that we would arrest them.

Q. Now, Mr. Geiger, was this the first group of "Freedom Riders" to appear in Ocala and to use the facilities of the Bus Terminal on June 16, 1961?

A. No, sir.

Q. Was there a group prior to this?

A. Yes, sir.

Q. And did this group prior to this group use the facilities of the bus Station?

A. They did, sir.

Q. Were there any incidents at all?

A. No, sir.

Q. On the same date, June 16, 1961, were there other groups of "Freedom Riders", excluding this group, to use the facilities of the Bus Station in Ocala?

A. Yes, sir.

Q. And did they use the facilities of the Bus Station in Ocala?

A. Yes, sir.

Q. Were there any incidents involved with the other two groups?

A. No, sir.

Q. Were there others, other than Richard O'Connor, Lesley Smith and Herbert Ebenezer Callendar at this time that did use the facilities of the Greyhound Bus Station and were undisturbed?

A. Yes, sir, there were some inside at the time we had this discussion.

Q. When you say, "some inside", what part of the Bus Station were they in?

A. They were inside the white restaurant, sir.

Q. Were they sitting and using the facilities of the white resaurant?

A. Well, I had seen them pass me and go inside the white restaurant at the time we had this altercation at the door. After these men had been placed inside the patrol car, I returned inside the ticket office and they were sitting at a table inside the white restaurant and had been served.

Q. They had been served?

A. Yes, sir.

Q. Was there any disturbance of that group?

A. No, sir.

Q. Then there were four groups in here on June 16, 1961, is that correct?

A. Yes, sir.

Q. Now, the only disturbance we had with the four groups was the disturbance to which you are testifying now, is that correct?

A. Yes, sir, that's correct.

Q. And all groups used all facilities of the Bus Station?

A. That's correct.

Q. Prior to June 16, 1961, had the facilities of the restaurant been used by the negro people?

A. Yes, sir.

Q. That is, before June 16, 1961?

A. Yes, sir.

Q. Mr. Geiger, at the time that you heard these loud words, when you saw the shoving, did you have any apprehension or fear of any possible violence unless you intervened?

MR. JACKSON: Objection, your Honor. I ask the Court to strike that answer. I believe that whether or not he had apprehension of violence is a question to be determined by the jury from the circumstances surrounding the situation, sir.

MR. MUSLEH: Your Honor, that's the gist of the charge here, as to whether he had apprehension or fear.

MR. JACKSON: It's not whether Mr. Geiger had apprehension but whether there was sufficient evidence to have given him apprehension, sir,

MR. MUSLEH: It is whether he had apprehension from the circumstances that existed at that time.

THE COURT: The question is what?

MR. MUSLEH: Apprehension or fear of any violence unless he intervened.

MR. JACKSON: Now, my argument is that this witness has the privilege of testifying to the circumstances surrounding the situation at the time but as to whether or not he had apprehension is to be drawn from the evidence by the jury, which has that prerogative, and not this witness.

MR. MUSLEH: Your Honor, whether or not his actions that preceded his apprehension or fear was justifiable if based upon his experience and so forth which he's established here. If he had apprehension or fear of violence, then a duty is imposed upon him and he has to testify as to whether he had that apprehension or fear.

THE COURT: The Court overrules the objection.

Q. **MR. MUSLEH:** Will you answer that question?

A. Yes, sir, I did.

Q. And what do you base that upon, Mr. Geiger?

A. From the people that were in this area, from information that I had gained from interviewing the people employed at the Bus Station, from conversations that I overheard at the Bus Station, from the general atmosphere of that particular location at that time.

Q. Let me ask you this question, Mr. Geiger. I believe you stated there were approximately some twenty people in this waiting room area here, is that right?

A. Yes, sir.

Q. At the time this shoving incident occurred, did these people congregate around the shoving incident?

A. Mr. Musleh, I can't truthfully say. There was people standing there at the counter for the baggage room, there was a row of benches that was filled with people sitting, there was people using the water fountain, the men's rest room which is just to the south of the west door, there was several people standing in that particular area at the time.

Q. Now, you testified that there were three local white people, Penuel, Windsor and Owen, which you ordered to disperse?

A. Yes, sir.

Q. Did all three obey your order and leave the premises of the Bus Station?

A. Yes, dir.

Q. Did anyone return?

A. Yes, sir.

Q. Who?

A. Mr. Windsor.

Q. And what happened when Mr. Windsor returned?

A. Excuse me, it was Mr. Penuel.

Q. Mr. Penuel. What happened when Mr. Penuel returned?

A. Well, he was escorted away. He was told to leave and stay off the entire area.

Q. Mr. Geiger, what is in this vicinity here south of the Bus Station?

A. There's a tavern - Mac's Tavern - and it's Monroe Street that runs on the south side.

Q. Monroe Street?

A Yes, sir.

Q. This is Mac's Tavern?

A. Mac's Tavern.

Q. Now, where did Penuel go when you ordered him to leave the premises of the Bus Station?

A. First, he went across the street there in front of Mac's Tavern.

Q. This would be in this area south of the Bus Station?

A. Yes, sir.

Q. All right, did he return from that area to where you were?

A. Yes, sir.

Q. Now, at the time Mr. Penuel was south of the Bus Station in the vicinity of Mac's Tavern, was there any obstruction between his vision there of where you and the three or where this one defendant, Callendar, was at that time?

A. No, sir.

Q. In other words, he came back towards you and Callendar and Smith and O'Connor, is that correct?

A. That's correct.

Q. And then you had him escorted by other officers away from there?

A. Yes. sir.

Q. And he stayed away that time?

A. Yes, sir.

Q. Was there any obstruction by you, or any men under your command to the other so-called "Freedom Riders' that came in on the same bus, other than O'Connor, Smith and Callendar?

A. No, sir, none whatsoever.

Q. The rest of them used the facilities?

A. Yes, sir.

Q. Unobstructed?

A. That's true.

Q. And that was true in all four incidents that day of June 16th, is that correct?

A. Yes, sir.

MR. MUSLEH: You may inquire.

CROSS EXAMINATION

Q. **MR. JACKSON:** Mr. Geiger, I believe that you understand that you are to testify as to what you know and see, is that true?

A. That's true.

Q. Now, you testified amoment ago that four groups of "Freedom Riders" came to the Bus Terminal.

A. True.

Q. Did you see those four groups of "Freedom Riders', sir?

A. I seen three.

Q. You seen three. So then you didn't see four?

A. That's right.

Q. Did you see four groups of "Freedom Riders" use the facilities inside there, sir?

A. I seen three.

Q. You seen three groups. When did the first group that you saw arrive, sir?

A. This was my first group.

Q. This was your first group. And, in other words, at the time these defendants here had arrived at the station to your knowledge you had not witnessed any other "Freedom Riders' using the facilities, had you?

A. Not on June 16th.

Q. Now, when did you witness some of them using the facilities before, sir, before June 16th?

A. One night in '59 I observed a complete busload and sometime during the year of '60 there was an intergrated group of Army personnel.

Q. Of Army personnel. Now, Mr. Geiger, you said also that on this particular day that you were stationed in the bus ticket area, is that correct?

A. That's correct.

Q. Now, you said that- where were the other seats in this particular ticket area? Would you draw a few lines to show the jury where the seats are?

A. There's a bench here with seats on both sides of it and there's a center partition in between. It's a long bench.

Q. Now, you said that you had been at the Bus Terminal earlier that day and talked with some employees and that you had gotten some information about the trouble, is that right?

A. That's true.

Q. Would you name those employees?

A. Well, one of the employees was the manager.

Q. The manager?

A. Of the Bus Station.

Q. Did he say what he was going to do or what others were going to do, sir?

A. He told me what others were going to do.

Q. Now, did you talk to anyone else, sir?

A. Some people outside the area, some that I knew and some that I didn't know.

Q. Did you disperse some from the area, sir?

A. I did.

Q. And the people that you had talked with that had informed you about what they were going to do, you had already dispersed them before the "Freedom Riders' - these riders - had arrived, is that correct?

A. There was only one that informed me what he would do.

Q. And you dispersed him?

A. I sent him off.

Q You sent him off. Anyone else that you talked with?

A No one that told me.

Q No one that told you. Then, so far as you knew, at the time that the defendants arrived, that there were no persons in here that you had talked with or had knowledge of that had said they were going to do anything, is that true?

A The manager had told me about a man whom he didn't know.

Q Well, was that man in the area?

A Well, I didn't know because the manager didn't know him.

Q So, my question was, that you, of your own knowledge, did not know of anyone who was atthe ticket area that had, prior to the arrival of this defendant, had said that they were going to do anything physically to anybody about using the facilities, is that correct? Would that be a fair statement?

A That's fair. All that said that I dispersed. There was some that made insinuations and give their personal opinion, which I had no reason to disperse.

Q Now, if I understand you correctly, further, Mr. Gieger, that you said that on this particular day that first you saw some pushing and you heard some loud talking, is that correct?

A Correct.

Q When you heard this loud talking, that is what attracted your attention to the people at the door?

A That's true.

Q You said that these three men were standing at the door with their backs to the door?

A Yes, sir.

Q Now, were they standing in line, shoulder to shoulder, or how were they standing?

A Shoulder to shoulder.

Q And where did you see them standing like that? Will you put three marks to show me where those three men were in line and where they were standing.

A All three were facing east and from north to south was Smith, O'Connor and Callendar.

Q Now, where were the other three men, how were they standing?

A Mr. Owens was facing Smith and in a westerly direction. These other two men, I don't know whether Penuel was next to Owens or Windsor.

Q But penuel and Owens were facing Callendar and these other men, is that correct?

A That's true.

Q Do you know how wide this door is?

A No, I don't.

Q Is that a double door or a single door.

A I think there's about an 8 inche or 10 inch partition between two doors.

Q In other words, you have a double door situation but they act as single doors, don't they?

A That's correct.

Q Can three people walk through either one of those sides shoulder to shoulder?

A Not through the same door, no.

Q Now, I believe you sadd that this person would be Owens, is that correct?

A That's correct.

Q And you say you are not certain about the other two fellows on this side, is that correct?

A I know who they were but I don't know what position they were in.

Q And this was definitely Smith, O'Connor and this was Callendar?

A That's true.

Q Did you see this defendant with his hands on anyone?

A I did not.

Q Did you hear this defendant make any statement to anyone inside of that ticket area?

A I did not.

Q You did not see him touch anyone, you didn't see him say one word to anybody, did you?

A Not inside there, no.

Q And when he came on the outside he only spoke to you, is that true?

A I believe that's true, yes, sir.

Q Now, Mr. Geiger, after you had told these people to move out of the building, would you show the jury approximately where they were standing outside on this platform, please?

A There's a strip of concrete outside where the buses park, parallel to the concrete - the concrete is probably six or eight inches above the pavement, and they were standing on this concerete area just behind the bus, just outside the west door.

Q And where was the bus parked that they were supposed to be on, do you recall?

A The bus that they were to be on was the closest bus parked there.

Q Now, Mr. Geiger, you didn't hear any vulgar language spoken by any of the people you say were standing here, did you?

A I couldn't recall the exact words that I heard, Counsel,

Q You wouldn't swear that you heard vulgar language, is that true?

A No, sir, I wouldn't.

Q As a matter of fact, you said that it was not spoken loud enough so that you could hear clearly what was said. Now that is your statement, isn't that right?

A No, I don't beleve so. It was spoken loud enough because it drew my attention at the time, appraently at the time, that they walked in the door. I was looking inside the restaurant, so the noise, the conversation and the words was loud enough for it to attract my attention. When I looked and seen the group of people that was there I immediately proceeded to them. So, in that short a space of time, the fact that we didn't want any violence to be committed there, I could not testify as to the exact words that were said.

Q If it had been spoken loud enough and clear enough, you could have heard what was said, isn't that true?

A I heard it. I just didn't remember it.

Q I mean, you heard a tone, a voice?

A I heard words.

Q You heard words but they were not clear enough or distinct enough for you to know what exactly they were, isn't that correct?

A Well, maybe I just wasn't concentrating enough on that at that time because I can't swear to exactly what I heard.

Q All right, sir. Now, when you said that there were twenty people in this vicinity, do you mean there were twenty people standing at the baggage counter here?

A. My estimate was of a minimum of twenty people inside the ticket area.

Q. The whole ticket area?

A. That's right.

MR. JACKSON: That's all, your Honor.

REDIRECT EXAMINATION

Q. MR. MUSLEH: Mr. Geiger, when you first observed the defendant Callendar here, along with O'Connor and Smith, exactly what did you first see, when you turned from your direction and looked over here, that is, towards the door, what did you first see?

A. I seen Owens and O'Connor with their arms interlocked, pushing each other.

A. All right, now, that was Owens and O'Connor?

A. Owens and Smith.

Q. Owens and Smith. What was Callendar and O'Connor doing at that time?

A. At that time I couldn't say, except they were standing shoulder to shoulder with Smith. There was this group of three men facing three. Now, when I arrived, there was some conversation. Owens---

Q. What conversation do you have reference to when you arrived?

A. Well, after, I arrived, Owens and Smith - I got them to stop their pushing - and I asked them what the trouble was. At that time Owens says that this man had stepped on his foot and he demanded an apology and he said something about "nigger". So, from there I got them quiet and got them outside andduring this entire conversation with them inside the Bus Station and outside the Bus Station the actions of Owens, Penuel, and Windsor was the actions of three men together.

That was the same actions as Smith, O'Connor and Callendar. Maybe one of them was doing the talking but all three of them was associated. I directed my request to all of them to get back on the bus. O'Connor denied my request, so did Smith and so did Callendar.

Q. Could you demonstrate here with me the position in which Callendar was standing in reference to O'Connor? Would you come down here just a minute, please? Assuming that I am O'Connor.

A. They were facing East at the time. If you are O'Connor, Callendar was standing to O'Connor's right, facing East.

Q. Well, let's look toward the jury now. Now, where was Callendar standing with reference to O'Connor, what position?

A. Just like this; they was shoulder to shoulder.

Q. Their shoulders were touching each other?

A. Well, I couldn't say they were touching but they were close, something like this.

Q. All right, now, I'm O'Connor - you get around he re- and where was Smith at in reference to me?

A. Smith was on this side.

Q. Shoving here?

A. That's true.

Q. And Smith and Owens were having difficulty here?

A. Yes, sir.

Q. All right, take your seat. Did you hear any words from Callendar to anyone? Could you distinguish any group of words or any persons speaking any group of words?

A. Well, a group of persons, yes, but I couldn't say that they came from Callendar.

Q. You couldn't say they came from Callendar's mouth?

A. No, that's true.

Q. Now, when you got outside of the building on the concrete pavement did you have any conversation with Callendar other than to tell him to get back on the bus?

A. None except when he attempted to take my photograph.

Q. And what was that?

A At that time I took his camera, told him he couldn't take any photographs---

Q. Did you return the camera to him.

A. At the time that he posted bond I personally handed him the camera, yes, sir.

Q. Well, you had apprehension or fear of violence unless this crowd was dispersed, is that correct?

A. That's correct.

MR. MUSLEH: That's all.

RECROSS EXAMINATION

Q. MR. JACKSON: Mr. Geiger, isn't it true that the first time you noticed Callendar was when Callendar had this camera fixing to take this picture and you spoke to him, didn't you?

A. That was the last thing I noticed before he got in the car.

A. Was he under arrest when he was fixing to take the picture?

A. He had just been placed under arrest

Q. Where did you place him under arrest?

A. Just before that.

Q. Before he started to take the picture?

A. Yes.

Q. Did Callendar tell you that he wanted to go to the restaurant to eat?

A. Callendar didn't say anything to me, to the best of my knowledge.

MR. JACKSON: Thank you.

MR. DOUG WILLIS, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. **MR. MUSLEH:** State your name, please?

A. Doug Willis.

Q. You are the Sheriff of Marion County, Florida?

A. Yes, I am.

Q. You are serving now your first term, is that right?

A. Yes, dir.

Q. Mr. Willis, how long have you been in law enforcement agencies?

A. Continuous for almost 24 years and some parttime work before that.

Q. Well, a total of how many years of your life has been spent in law enforcement work?

A. Close to 30 years.

Q. And how old are you, Mr. Willis?

A. Fifty-four.

Q. So, over half of your life has been spent in law enforcement, is that correct?

A. Yes, sir.

Q. How many years of that has been in Marion County?

A I have been in Marion County for fifteen and a half years.

Q During the fifteen and a half years in Marion County, all of that has been in law enforcement?

A. It has.

Q. You were elected Sheriff of Marion County this past year, is that correct?

A. Yes, sir.

Q. On June 16, 1961, did you have occasion to be at the Greyhound Bus Terminal in Ocala, Florida?

A. I did.

Q. What was the occasion for you to be down there, Mr. Sheriff?

A. We had a call that there were a bunch of "Freedom Riders" arriving at the station around 2:00 o'clock.

Q. And what was the purpose of you going down there?

A. To try to prevent any trouble or violence.

Q. Your purpose was to prevent any violence there in the Bus Terminal, is that right?

A. That's correct.

Q. Did you see the defendant here, Herbert Ebenezer Callendar?

A. Yes, sir, I did.

Q. And did you see him when you first went down to the Bus Station?

A. No, I didn't, not when I first went to the station.

Q. When did you first go to the Bus Station on June 16, 1961?

A. It was just prior to the arrival of the bus. I don't know exactly what time it was.

Q. Now, while you were at the Bus Station did you see the defendant here?

A. I did.

Q. Now, will you state to the jury now and this Court under what circumstances did you see him?

A.

A. At the time I was arriving on the south side of the building, the south entrance.

Q. That would be on Monroe Street entrance?

A. That's right.

Q. All right.

A. I was standing near the door at that entrance and someone called that the bus was there, the bus had arrived so I went around the building and came up to the - I didn't rush around there but I walked around casually to see what was to take place. I walked around to the west side and by that time the people from the bus were streaming into the waiting room of the Bus Station. You want to know when I first saw him?

A. Yes, sir, what called your attention to him?

A. Shortly after I got around by the door I noticed a little scuffle on the inside of the building.

Q. Would that be the west door?

A. I was at the west door, yes, sir.

Q. You were at the west door?

A. Yes, sir.

Q. All right, you noticed scuffling inside the building. Go ahead and tell us what you saw there.

A. I opened the door and entered and I believe that during the time I had the door partly open that Deputy Geiger was pushing these folks or asking them to leave the place and pushing them some too, I think. He brought them on through the door after I stepped aside and held the door, I believe. I came on outside next to the ramp where the buses unload. You want me to carry on as to what took place?

Q. Well, now, let's stop right there now. Mr. Sheriff, looking here at the blackboard, this has been identified as the Bus Station, this is the ticket area, this is the west door, this is the concrete ramp and this is the bus. Now, you state that you came through the west door, is that correct?

A. That's correct.

Q. Now, tell us what you first saw when you came through the west door.

A. When I came through the west door, H.A. Geiger, my Chief Deputy and several people, several white people and several colored where in a huddle more or less, right in the door.

Q. Did you hear any words being exchanged between these two groups of people?

A. I did.

A. Such words as what, Mr. Willis?

A. Well, Mr. Geiger was insisting on these people getting back on the bus, asking them to get back on the bus or to leave the area, that he didn't want any trouble there.

Q. Now, Mr. Willis, my question was, did you hear any angry or threatening words between the groups of white and colored people in the ticket room when you entered into the west door?

A. I couldn't single out any conversation from any particular person, other than there being some voices in a jumble.

Q. And as you walked through the west door, Mr. Geiger was herding a group of people out of the west door, is that correct?

A. Yes, sir.

Q. Is that where you first saw the defendant?

A. That's where I first saw him, yes, sir.

Q. All right, now, tell us what position he was in and what he was doing exactly when you first saw him, as best you remember, Was he backing up?

A. I believe he was. I believe when I first saw him he was backing out of the door to the rear.

Q. Out of the door?

A. Yes, sir.

Q. How many people did Mr. Geiger take out of the door to the best of your knowledge?

A. Six or seven.

Q. Now, were some of those people locals, whom you recognized?

A. Yes, sir.

Q. What did he order all of the people to do?

A. To leave the area.

Q. Now, did the local people at that time that he ordered them to leave the area, did they leave?

A. They did.

Q. Did anyone return?

A. Yes, sir, Mr. Penuel returned.

Q. And what happened when Mr. Penuel returned to that area?

A. We advised him to leave or we'd put him in jail,

Q. And did Mr. Penuel leave?

A. He left that time, yes, sir.

Q. Now, did Mr. Geiger, in your presence, ask the defendant to get on the bus?

A. He did.

Q. How many times?

A. Four or five times.

Q. That you heard of?

A. Yes, sir.

Q. Did the defendant get on the bus?

A. He did not.

Q. Mr. Geiger continually asked him to get on the bus?

A. He did.

Q. Are you acquainted with one Lesley Lee Smith and James Richard O'Connor?

A. I am.

Q. Were they with the defendant at this time?

A. They were.

Q. Was Mr. Geiger's remarks addressed to all three?

A. Yes, sir, they were.

Q. All three refused?

A. That's right.

Q. Mr. Sheriff, based upon your some 30 years of law enforcement experience, did you have any reason to believe or did you have any apprehension or fear of violence being committed within the ticket room had not Mr. Geiger or you or any other member of your department broken up this scuffle as it started?

MR. JACKSON: Your Honor, I object to the question as being leading and that the conclusion being sought is one for the jury.

THE COURT: Overruled.

A. I had a feeling there would have been violence, yes, sir.

Q. Did you give any orders to any of your men what to do if they thought that?

A. I did.

Q. And what was your order?

A. To disperse them immediately.

Q. Disperse and send them off?

A. That's right.

Q. Now, to your knowledge, were there other groups of "Freedom Riders" in Ocala on June 16, 1961, other than the group that the defendant Callendar was with?

A. Yes, sir.

Q. Were there any incidents that day except this one?

A. None whatever.

Q. The facilities of the Bus Station was used by all groups?

A. That's right.

Q. That is to the best of your knowledge and what you've been told?

A. Yes, sir.

Q. And there were no incidents involving any violence whatsoever, is that right?

A. Yes, sir, that's right.

Q. In the Common Law, you are the chief law enforcement officer in Marion County, is that correct?

A. Yes, sir.

Q. You have a duty to preserve peace and order?

A. I fed that I have and I'm going to do it.

Q. Is that what your instruction was on that day?

A. Yes, sir.

Q. Now, as far as this defendant Callendar is concerned, when you first saw him, he was backing out the door, is that right?

A. I believe he was. I am not positive. He was in the group but I believe he was toward the door when I first saw him.

Q. He was within the group that Mr. Geiger was getting out of the Bus Station?

A. Yes, Sir.

MR. MUSLEH: You may inquire.

CROSS EXAMINATION

Q. **MR. JACKSON:** Sheriff, you said that the time you entered or at least you approached the scene, that you went to the door and opened the door?

A. That's correct.

Q. Which way did you swing the door, in or out?

A. I couldn't tell you which way it was.

Q. Now, you say that you saw Mr. Geiger turn the people out of the door, is that right?

A. That's correct.

Q. Pushing some, is that right?

A. Towards the door.

Q. Towards the door?

A. That's right.

Q. How do you recall where you saw Callendar?

A. He was still in the group when they got outside and he was there with them.

Q. In other words, when you actually paid attention to Callendar, he was in a group standing out here, wasn't he?

A. Well, I didn't pay any attention to any of them, specifically, until we were outside the door. I didn't know who they were or where they came from or anything about them.

Q That's what I'm saying. As a matter of fact, you first noticed Callendar when he was right here with the other two men talking to Officer Geiger outside of the door, is that true?

A. I'm reasonably sure I saw him inside the door before he-----

Q. What caused you to pay attention to him?

A. Well, I remember there being two colored people.

Q. Well, do you know whether it was Callendar or any other colored person?

A. There weren't any other colored people in the group other than him and Smith and O'Connor, were the ones in the group.

Q. There were no other colored people present there?

A. Not in that particular group, no.

Q. So, you just saw two colored people there in that area, is that your testimony?

A. In that particular group, I said.

Q. Well, you are talking about people that were at the door and out here on the pavement here----

A. I am talking about the group that Mr. Geiger was forcing out the door, which were assembled in the center of the room, by the door.

Q. You saw only two colored people there?

A. That's all I've ever seen.

Q. Did you see any more?

A. There were colored people around other than that in other groups or in another area but not right in that particular group.

Q. So, you say you saw two colored people but you don't know whether this was Callendar, do you?

A. I know it was him, I do.

Q. How do you know?

A. Because I know I've seen him sitting there and I know he was one of the same fellows I saw----

Q. How can you identify him, Sheriff. That's what I'm asking.

A. By his gold teeth and other markings and he had----

Q. You saw that when he was backing out of the door?

A. No, I didn't notice that specifically right at that particular time but he didn't run off any place and he finally turned around where I saw his face.

Q. That's what I'm saying, Sheriff. Isn't it true that you actually saw this defendant when he was standing right here, when you noticed him, wasn't it?

A. I noticed him out there as well as in the group---

Q. That's when you saw him with the camera, didn't you? Isn't that true?

A. He had some kind of a camera or something hanging over his shoulder---

Q. Standing out there on that ramp, isn't that true?

A. No, he wasn't standing on the ramp when I first saw him.

Q. You didn't seehim there?

A. No, I didn't. I saw him standing on the ramp after he came out of the door.

(Court recesses for five minutes)

Q. Sheriff, did you see any other persons standing out here on the ramp when the people were inside in the ticket room, when you first walked up?

A. When I first walked up to the door, I think I remember seeing some people down the ramp, to my left. If I'm not badly mistaken, there were one or two people out near the corner of the building when I came around to the door.

Q. In other words, when you say the corner of the building, you saw some people back here?

A. That's right.

Q. People back in this area, on this side?

A. That's right, down a little farther than where you have your finger, down along towards the buses, that's right.

Q. You saw people in both of those areas?

A. I didn't pay any particular attention to them. I just happened to notice there were other people out there.

Q. Do you know whether any of those people were colored or white?

A. I couldn't tell you, sir, no.

Q. Now, Sheriff, you said you noticed a scuffling inside of the ticket room, is that right?

A. Not in the ticket room but in the waiting room.

Q. In the waiting room?

A. That's right.

Q. Did you see this defendant with his hand on anyone?

A. No, I didn't

Q. Did you see - you said that he was with two other person, is that correct?

A. There were two colored and three or four or maybe five white people in the group. I don't know just exactly. I didn't see but two colored people, though---

Q. Did you see anyone have hold of anyone else?

A. Yes, I did. I saw one of the defendants that was tried here previously - he's in the Court right now - I saw him with his hand on Smith.

Q. In other words, you saw one of the defendants, who was O'Connor, with his hands on another one of the defendants who was Smith, right?

A. Insisting on him to comein and eat; they were going in and eat.

Q. Going in and eat?

A. That's right, after we had asked them to leave.

Q. You didn't see anyone else with their hands on anyone else?

A. I saw Deputy Geiger with his hands on several.

Q. But he was pushing them out?

A. Pushing them out the door, yes.

Q. You didn't hear this defendant curse or use any profane language or anything, did you?

A. I did not.

Q. And you say you didn't see him hurt anybody or touch anybody?

A. No.

REDIRECT EXAMINATION

Q. MR. MUSLEH: Mr. Sheriff, back on the concrete ramp, you saw the defendant backing out the door at the direction of Deputy Geiger, is that right?

A. That's right

Q. Going out the west door?

A. That's right.

Q. Now, after Deputy Geiger got this defendant out of the west door and on to the ramp, in your presence, did Deputy Geiger ask this defendant to re-board his bus?

A. He did.

Q. How many times?

A. Several times after he got outside I'd say five or six times in all, in going through the door and after they got out on the ramp. I told him two or three times myself to get on the bus.

Q. You told this defendant to get on the bus?

A. Yes, sir.

Q. Did you tell J. Richard O'Connor to get on the bus?

A. I did.

Q. Did you tell Lesley Lee Smith to get on the bus?

A. I did.

Q. Did they refuse to get on the bus?

A. They did.

Q. Did you, Mr. Sheriff, disperse these three local white people. When they went outside did you tell them also to leave?

A. I did.

Q. And did those three people leave the premises?

A. They left

Q. At your command and under your direction, is that right.

MR. MUSLEH: That's all.

RECROSS EXAMINATION

Q. **MR JACKSON:** Sheriff, you said that all three of the white men left the scene. Did one return?

A. One returned.

Q. What was this name?

A. His name was Penuel.

Q. What did he ask about?

A. He didn't ask me anything but he came back to the scene and I told him that if he didn't get away from there---

Q. Did he come back and question Mr. Geiger as to whether he was a Deputy Sheriff?

A. No, he did not

Q. He didn't?

A. Not Penuel didn't.

Q. Well, who questioned him?

A. Another man asked-----

Q. Who was that?

A. A Mr. Owens asked him that, right in the door while they were in the door, before they all got outside the door. He questioned him and I told him he was Deputy Sheriff.

Q. How were you dressed at that time?

A. Just about like I am now.

Q. Just in your plain clothing?

A. Just about like I am now, practically.

Q. Well, I'm trying to get at the record. Now, did Mr. Geiger have a uniform on?

A. He did not.

Q. Did any of your deputies have a uniform on there at that scene?

A. Not right inside the building. At that time I had uniformed officers in the area but not in the Bus Station.

Q. The men that were there had plain clothing on, is that correct?

A. That's right.

Q. And all the identification that you had on you, I believe, was this Sheriff pin on your cross-tie, on your---

A. That's right and this little badge that I wear on my coat.

Q. A little badge on the lapel of your coat?

A. That's right.

Q. Now, I asked you at another time whether or not that indicated that you were the Sheriff?

A. Well, I don't know that it would indicate I was the Sheriff. I've seen little badges of similar nature that represented other things than officers.

Q. And then people who were Sheriff sometime wear them, don't they?

A. Yes. They don't have authority to wear them, a star of any kind, pertaining to an officer, after they are---

Q. But you didn't show this defendant your badge, your official badge, did you?

A. He didn't ask me for one.

Q. Did you see Mr. Geiger, did he show him his official badge?

A. No, he didn't.

Q. Did you know of any officer under your jurisdiction at that time show this defendant their official badge?

A. Nobody showed it there. Nobody asked for it, other than Mr. Owens. I told them that I was the Sheriff of Marion County and they should leave the area, get on the bus or leave the area or we'd have to place them in jail.

Q. But even after you told Mr. Owens, even after Mr. Geiger, did he not?

A. Not after I told him that he was my Chief Deputy.

Q. But then Mr. Owens knew you personally, is that right?

A. That's right, he did.

Q. So, that's why he knew you were the Sheriff, is that right?

A. That's right.

Q. Neither one of these defendants knew you were the Sheriff, did they?

A. I didn't have to go up and show them all my badges.

Q. I'm just asking you, they didn't know you like Mr. Owens would know you, did they?

A. No, I never saw them before in my life

MR JACKSON: That's all. Thank you.

REDIRECT EXAMINATION

Q. **MR. MUSLEH:** On the ramp by the west door did you tell James Richard O'Connor, Lesley Lee Smith and Herbert Ebenezer Callendar that you were the Sheriff of Marion County, Florida?

A. I did

Q. At the time did you have a star which now appears in the left buttonhole of your lapel here in your coat?

A. I did.

Q. Did you also have the identification on the tie mark there?

A. I did.

Q. And the word "Sheriff" written across there, Did Herbert Ebenezer Callendar ask you for any authority?

A. He did not.

Q. Did James Richard O'Connor ask you for any?

A. No, sir.

Q. Did Lesley Lee Smith ask you for any?

A. He did not.

Q. They accepted, then, your identification as Sheriff, without question?

A. They must have.

Q. There was no question about it?

A. No question.

RECROSS EXAMINATION

Q. **MR. JACKSON:** What did O'Connor tell you----

A. He didn't tell me anything.

Q. O'Connor didn't tell you that he wanted to go eat?

A. He didn't tell me. He told Smith, "Come on, let's go eat".

Q. Oh, he told Smith, to go eat?

A. That's right. He said, "Let's go eat". I said, "You won't eat today, not right now".

Q. Who said that?

A. I told him. I said, "You're under arrest".

Q. And that's when you put him under arrest?

A. During the time that the conversation was going on, that's right. They were going, regardless of Mr. Geiger's requesting them to go on the bus, they was going to go eat anyway.

Q. So you prevented them going and eating?

A. I did.

Q. And that's when you arrested them?

A. I arrested them when they failed to leave the area, either reload the bus or leave.

Q. Couldn't they have left the area to go eat?

A. He was pulling him towards the Bus Station, not away from the area.

Q. What I mean is - Sheriff, you were standing out there on the platform, is that right?

A. That's right.

Q. Now, if they had gone on inside the building to eat, wouldn't that have been from the area?

A. It surely would not.

Q. Oh, you meant the area of the whole Bus Terminal?

A. That's right.

Q. They had to leave the Bus Terminal?

A. That's right.

MR. JACKSON: I see. Thank you.

REDIRECT EXAMINATION

Q. MR. MUSLEH: Three white men left the Bus Terminal, didn't they?

A. They did.

Q. One of them was escorted by your deputies when he tried to return, did he not?

A. He was.

Q. Did you prohibit any other "Freedom Riders" that was on the same bus as the defendant from eating in the white restaurant?

A. I did not. In fact, I didn't see any of the rest of them to identify them as being with these people.

Q. Did you prohibit any of these "Freedom Riders" that day?

A. I did not.

Q. From using all of the facilities of the restaurant?

A. I did not.

Q. And this prohibition against eating was only after you had placed these three under arrest, is that correct?

A. That's correct.

Q. And that's when they got hungry and wanted to eat?

A. That's right.

RECROSS EXAMINATION

Q. MR. JACKSON: I beg your pardon, you said that's when they got hungry and wanted to eat?

A. Yes.

Q. Do you know whether they were hungry before that time?

A. I didn't hear him say anything about being hungry until that time when he said, "Let's go eat".

Q. Then, when you saw him, you saw your deputy pushing him out of the door, is that correct?

A. Yes.

Q. Then why do you say that's when he got hungry outside of the door?

A. I didn't aay when he got hungry.

Q. Oh, Mr. Musleh said that?

A. Mr. Musleh said that.

Q. Sheriff, as a matter of fact, you didn't see anybody using the restaurant that day, did you, "Freedom Riders"?

A. Yes, I did, I saw some. I was down there during the time those came in later in the afternoon and I watched them and they weren't disturbed by anybody, either.

Q. But you didn't see any person with this defendant using the restaurant?

A. No, I didn't.

MR. J.A. WINDSOR, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. MR. MUSLEH: State your name.

A. J. A. Windsor.

Q. Where do you live at, please?

A. Ocala, Route 1.

Q. On June 16, 1961 were you at the Bus Station on or around noon in Ocala, Marion County, Florida?

A. Yes, sir.

Q. What was the occasion of your being at the Bus Station, sir?

A. I went to meet my wife that was coming in on the bus.

Q. Your wife was coming in from where?

A. Columbus, Georgia.

Q. Columbus, Georgia and you went down to the Greyhound Bus Terminal to meet your wife?

A. Yes, sir.

Q. I will ask you to look at the defendant at the table here who is identified as Herbert Ebenezer Callendar. Did you see this defendant at the Greyhound Bus Terminal on June 16, 1961?

A. Yes, sir.

Q. If you will please give your attention to the board here. This has been sketched out as the Bus Station, this being Monroe Street to the south, this being Mac's Tavern in this area, the west door as you go into the Bus Station, this being the concrete ramp on the west side, this being the bus, the baggage room, the restaurant, the kitchen and the restaurant here. You are acquainted wi with this area?

A. Yes, sir.

Q. Where did you see this defendant, Herbert Ebenezer Callendar, now, in the Bus Station, the first time you saw him on June 16, 1961?

A. As he come in the west door, off the bus.

Q. All right, sir, would you tell the Court now just what you saw? What did he do when he came in, what happened at that time?

A. Well, I was sitting down on the seat, myself and Mr. Penuel, and we saw Mr. Owens there - we knew Mr. Owens already and had been talking to him - and these three fellows come in at the door as Mr. Owens started out and some scuffle started amongst the three. I don't know exactly what happened but there was more or less of a push.

Q All right, now, the scuffle started between who?

A. Mr. Owens and Smith.

Q. Owens - can you identify this party sitting right there with the suit on?

A. Yes.

Q. Now, there was some scuffling going on there, is that right?

A. Or push.

Q. At that particular time did you see the defendant Herbert Ebenezer Callendar?

A. Yes sir.

Q. Where was he at?

A. He was inside the west door, he and Smith---

Q. He was inside-----

MR. JACKSON: Your Honor, I'm going to object. Let this witness described what he wants to testify to to this jury.

Q. MR. MUSLEH: He was inside the west door?

A. Right.

Q. He was in the restaurant part?

A. In the waiting room part.

Q. All right go ahead, sir.

A. That's all I seen as we started out. We had started out and they had the door more or less blocked, the three of them.

Q. Who had the door blocked?

A. This man here and Smith.

Q. You are identifying this man here, the defendant Herbert Ebenezer Callendar, as James Richard O'Connor, as Lesley Lee Smith?

A. Right.

Q. Now, will you describe which door that you say they had more or less blocked? Is that the west door?

A. The west door, yes, sir.

Q. Will you describe to the jury in what manner they had the west door blocked?

A. Well, as they came in, three in the bunch, and Mr. Owens started out, why, I don't know what happened but there was some pushing, see, as we started out and the door was blocked and we just stopped in the congestion, you see.

Q. But you started out the west door?

A. Yes, sir.

Q. Who was standing in front of the west door, blocking the west door?

A. This man here, and Smith.

Q. Callendar, this man here?

A. That's right.

Q. And Smith?

A. Yes, sir.

Q. Now, did you see Officer Geiger?

A. I seen him after he come in, as we started out. Some congestion was there and besides that Mr. Geiger stepped in, which I didn't even know Mr. Geiger, didn't know who he was, even.

Q. What did Mr. Geiger do when he stepped in?

A. He started pushing myself and Mr. Penuel back, saying, "Get out of the way", "Get out of the way".

Q. Mr. Geiger shoved you back and shoved Mr. Penuel back?

A. That's right. "Get out of the way".

Q. All right, go ahead, sir, what happened then, what did you do then?

A. We got out.

Q. Did you go out the west door?

A. No, sir, I went out at the north door, towards Mac's Tavern.

Q. You went out the Mac's Tavern door on Monroe Street?

A. Yes, sir

Q. Now, at the time that Mr. Geiger shoved you and Mr.

Penuel and told you to get out, where was Callendar?

A. He was standing about two feet from the west door, I would say, on the inside.

Q. On the inside?

A. On the inside.

Q. In the front of the door?

A. Yes, sir.

Q. Mr. Windsor would you step down here, please, and demonstrate with me the manner in which Callendar and O'Connor was blocking the door. Now, just assume, now, I'm O'Connor. All right, you're Callendar now. You tell us how Callendar and O'Connor were standing

A. Something like this, as they come facing this way.

Q. You, Penuel and Owens were walking in a westerly direction?

A. That's right.

Q. Toward the door?

A. Towards the door, going out.

Q. And was Callendar standing still at that time in front of the door?

A. Yes, because Smith, because Owens and Smith was pushing one another

Q. Owens and Smith were pushing one another?

A. Yes.

Q. Was there at the time, or just prior to that time, any exchange of words in the waiting room that would denote any resentment of these people's present in there?

A. Yes.

Q. Such as what?

A. Mr. Owens told him, says, "The colored waiting room is around the corner".

Q. All right, were there any other words that were said at all that you heard within the waiting room?

A. Not that I would remember otherwise. Something like that, you don't have your mind on, you don't pay a lot of mind.

MR. MUSLEH: You may inquire.

CROSS EXAMINATION

Q. MR. JACKSON: Mr. Windsor, you said that when you went into the waiting room that you saw three people come through the door?

A. Right.

Q. Tell this jury where were you standing at that time.

A. I had got up off the seat---

Q. How about taking the crayon and showing me where you were, sir?

A. Would you call this the west door here?

Q. This would be the west door right here, sir, coming in here. Now, where were you?

A. We was in the waiting room and when we come out of the waiting room---

Q. Well, where were you when you first saw these people come through the door? Were you seated or were you standing?

A. Seated.

Q. And where were you seated?

A. In the bus Station, in the waiting room

Q. Whereabouts, sir?

A. Well, I can't show you without a picture of the Bus Station.

Q. Well, you can show me on this diagram.

A. No, I don't see that seats there on that diagram.

Q. How about drawing us another one so that you can show it to us.

A. I don't know how to draw it. You've got the Bus Station here and suppose the seats was here and we was setting on this seat when we started out and met three men in the door.

Q. All right, now, who was sitting on the seat with you?

A. Mr. Penuel.

Q. Who else?

A. That's all.

Q. Just you and Mr. Penuel.

A. Sure.

Q. Now, you and Mr. Penuel, as I understand it correctly, were seated on the bench?

A. That's right.

Q. Were you sitting there when the two men started in the door?

A. Yes.

Q. Had they gotten inside the door before you got out?

A. That's right

Q. Now, what happened, why did they stop?

A. Why did they stop?

Q. Yes.

A. Because Mr. Owens met them in the door. He had started out at the door.

Q. Mr. Owens had started out of the door?

A. That's right

Q. And Mr. Owens met them as they entered the door?

A. That's right

Q. What happened at that time?

A. I don't know what happened. We had started out----

Q. Well, what did you see happen, that's what I'm trying to ask you.

A. There was some pushing.

Q. Who pushed who?

A. Well, I don't know. They both had their hands up.

Q. Did you see Mr. Owens push Smith?

A. Yeah, but I think Smith pushed him back.

Q. Did you see this defendant push anybody?

A. Yes, he was pushing back

Q. Who---

A. No, not this man - Smith, But they was all in the door.

Q. Wait a minute, let's get it clear. This jury has got to know what happened. Now, where was Smith standing and where was- when they came in the door - this is the door - where was Smith standing and where was Mr. Owens standing?

A. Oh, within about two feet of the door, coming inside----

Q. Were they face to face?

A. Yes.

Q. All right, now, who was next to Smith? Did you have your shoulder next to Mr. Owens' shoulder?

A. No, I wouldn't say that because----

Q. How far away from Mr. Owens were you?

A. Oh, I would say three feet.

Q. You were three feet from Mr. Owens?

A. Something like that.

Q. And how far away from Mr. Owens was Mr. Penuel?

A. Right by the side of me.

Q. He was right by the side of you?

A. Yeah, I wouldn't say if he was either side.

Q. Well, did you and Mr. Penuel ever get shoulder to shoulder with Mr. Owens?

A. Yes.

Q. And what were you doing shoulder to shoulder?

A. You wouldn't have got out the door if you hadn't of got shoulder to shoulder with somebody.

Q. Now, when you got shoulder to shoulder were you facing anybody?

A. Yeah, I was facing the three fellows we met.

Q. That you all met?

A. Yeah.

Q. In other words, you and Mr. Owens and Mr. Penuel were standing shoulder to shoulder and you were meeting the three men. is that right?

A. We were trying to get out any way we could get out to meet the bus.

Q. Well, was anybody stopping you from walking behind these men to get out? You said they were four or five feet inside the Bus Station.

A. No, I didn't, I said two feet inside the Bus Station, within two feet or something like that.

Q. Well, you mean there was not room behind them to go out of the door?

A. We could have pushed out, yeah.

Q. No, I mean, walked around them. Here are three men you said, standing here. There was room over here, right?

A. I wouldn't say there was room around there.

Q. Well, why wouldn't there be room around there?

A. Because three men in the door fills the door up.

Q. All right, well, let's see, come stand right here. This is the door here. Stand right here. Does that fill that up.

A. They were standing right here.

Q. Well, now, were they this close to the door?

A. No.

Q. How far away from the door were they? Well, stand out here where they would be standing. Would they be standing out this far from the door there?

A. Yeah, about here.

Q. Now, stand there. Isn't there enough room to come through the door here?

A. Yeah, we could have crowded up.

Q. Now, I want to ask you one other question. Were you trying to keep Mr. Callendar from coming in the Bus Terminal?

A. I didn't know he was coming in.

Q. Well, why were you standing shoulder to shoulder with Mr. Owens, sir?

A. When we started out we naturally met all of them within the doorway.

Q. Well, what were you doing standing shoulder to shoulder, like that?

A. Because we couldn't get out without going way around, I wanted to see what was happening.

Q. All right, who was standing next to Mr. Owens?

A. I was.

Q. You were standing next to Mr. Owens?

A. Standing right next to Owens.

Q. And who was in front of you?

A. This boy was standing on the left.

Q. No, I say, who was in front of you, that's what I want.

A. There was nobody in front of me except these men we met.

Q. You met three men in a door and you were standing shoulder to shoulder you had to be in front of one of the men. Now, which one of the men were you in front of?

A. I was fronting this man right here, this man here.

Q. You were fronting Callendar?

A. Yeah.

Q. All right, just one moment. Tell this jury - you said you were next to Mr. Owens?

A. That's right.

Q. And you said Mr. Owens had his hand on Mr. Smith?

A. That's right.

Q. Who was next to Mr. Smith?

A. What do you mean, Mr. Smith?

Q. Who was standing next to Mr. Smith, the next fellow that was to Mr. Smith.

A. I don't know Mr. Smith except I know this man back here if that's who you're talking ablut.

Q. Yes, well, who was next to him?

A. The three was - now, get that again?

Q. Who was next to Mr. Smith. You said that Mr. Smith was on this side and Mr. Owens was confronting Mr. Smith and who was next to Mr. Smith?

A. The white fellow, whoever he is.

Q. Mr. O'Connor?

A. O'Connor.

Q. All right, now, Mr. O'Connor was next to Mr. Smith, is that right?

A. O'Connor was in the center.

Q. In the center?

A. In the center.

Q. And Mr. Penuel was on the other end?

A. That's right.

Q. And you were next to Mr. Owens but you were facing, not O'Connor, but Mr. Callendar. How did that happen?

A. I was facing all the men.

Q. Just a moment. I asked you/a specific question. You said you were standing shoulder to shoulder with Mr. Owens, is that correct?

A. That's right.

Q. And you were facing this defendant here?

A. That's right.

Q. And yet you say that Mr. Callendar was the third man over. Mr. Smith was here, Mr. O'Connor was here, Mr. Callendar was over this side, Mr. Owens was here and you were here and the other man was on the other side, is that right?

A. I was on the left-hand side as we go out of the door this - a-way.

Q. Well, now, were you next to Mr. Owens?

A. Yes, Owens was in the center.

Q. Oh, Mr. Windsor was in the center now?

A. No, Owens was in the center and I was facing him here and Mr. Penuel was right next to me here.

Q. Who?

A. Mr. Penuel.

Q. Who was in the center?

A. Mr. Owens was in the center.

Q. All right, then let's line these men up for this jury, so we can see. I think I'm confused now. This was the door. Do you want to point out now who was where? Put an "O" for Mr. Owens, all right?

A. I would say this was Owens right here.

Q. In the center?

A. There was some confusion, you forget part of this stuff----

Q. But just a moment. The thing that I'm saying, sir, you are testifying to this jury and you are telling this jury that there were three men shoulder to shoulder and you were shoulder to shoulder with them.

A. That's right.

Q. Now, you remember that, right?

A. That's right.

Q. Now you should know what position you were in.

A. And I was standing right here and that man there was here and where Mr. Penuel was, I don't know exactly but he was down there at the door with me.

Q. All right, how do you know that Mr. Callendar was in front of you?

A. Because I never will forget that beard and all.

Q. What else did he have on?

A. He didn't have on anything that I know of except that beard that I remember pretty well, it was so unusual.

Q. The fellow that had the camera, where was he?

A. I didn't notice that.

Q. Did you notice a camera?

A. There was a camera but I don't remember even----

Q. Didn't one of the men have a camera?

A. Yes, somebody had a camera.

Q. All right, now, was this man in front of you or was it this man over here.

A. There was a camera but I don't even remember who had it.

Q. The man who had the camera was where, to your left or right?

A. I would say he was pretty near in front of us.

Q. Was he to your left or your right?

A. I would say more to the right.

Q. He wasn't the one in front of you, was he?

A. I wouldn't say he was because it was sort of confusing.

MR. JACKSON: That's all.

REDIRECT EXAMINATION

Q. **MR. MUSLEH:** Mr. Windsor, there was some commotion in this area involving Owens and Smith, is that correct?

A. That's right.

Q. There was a shoving incident, is that correct?

A. Yes.

Q. This wasn't a dance class where you all took stationary posts and remained there, was it?

A. No.

Q. There was some moving around by all of you?

A. That's right.

Q. So, answers in response to counsel's questions, where you were at a particular time, you didn't walk from where you were sitting to go to one particular spot and remain frozen there at that spot, would you?

A. No, sir, we were just trying to get out the door.

Q. You were trying to get out the door and Callendar was blocking the door?

A. That's right

MR. MUSLEH: That's all. Thank you.

RECROSS EXAMINATION

Q. **MR. JACKSON:** You said that Mr. Callendar was blocking the door. Was it because you were stopping him from coming in?

A. I didn't have any reason to stop him. I didn't know him.

Q. Well, why were you in front of him?

A. Because I was trying to get out the door.

Q. So, the only way out the door was over him, to walk over him.

A. It would have helped if he had moved.

Q. But you weren't supposed to move? If I understand you correct, Mr. - I'm just trying to get this straight here. When these men came in the door, you were sitting on this seat, then you got out of your seat and ran over here and got in front of these men, is that right?

A. No, we did not.

Q. Then how did you get over there before he could get two feet from the step.

A. We was walking out of the door.

Q. And you walked over there and got in front of them?

A. Yes, we did.

Q. I understand.

A. We walked and got---

Q. I understand. Did you say anything to any of the parties?

A. No.

Q. Did anybody say anything to you?

A. No, nobody didn't say nothing except the Sheriff.

Q. Did anybody push you, did this defendant push you?

A. No, he didn't push me.

Q. Did you push him?

A. No, I shouldn't have because I didn't know who he was, I didn't know he was coming in, I didn't know who he was.

Q. Then the only man you say pushed you was the Sheriff, right?

A. That's right.

Q. Which way did he push you?

A. He pushed me out of the door.

Q. Did he push you out of this door or push you out of another door?

A. The north door. I can't tell from the drawing you got there.

Q. In other words, the door he came through, he didn't push you out of that door?

A. No, he pushed me out at the north door, on that other side, on Monroe Street.

Q. I understand. As a matter of fact, didn't you say that you didn't see anybody step on Mr. Owens' feet?

A. No, I didn't see him step on his feet but I know when he pushed him back he said he stepped on his foot---

Q. You saw Mr. Owens push Smith back?

A. He pushed him back and told him to get off his foot.

Q. Did you hear him say that?

A. Yes, I heard him say that.

Q. Are you sure you heard him say that?

A. I could re-word that for you.

Q. You remember testifying before in this case on the 5th of July 1961?

A. Yeah, sure, I remember.

Q. You remember the court reporter sitting right here taking your testimony and a court reporter sitting over there taking your testimony? You remember that?

A. Yeah, I remember.

Q. And you remember Mr. Musleh asking you certain questions and remember me asking you certain questions, do you remember that?

A. Yeah.

Q. And you remember we asked you did you see what did you see happen, do you remember that?

A. Yes, I remember it.

Q. All right, do you know what you told us at that time?

A. Yeah, I know what I told you.

Q. All right, then repeat what you told us at that time.

A. I told you I definitely see him step on his foot.

Q. All right, that's all.

A. He said he did----

MR. MUSLEH: Let him finish his answer. You're not going to shut him up in the middle----

MR. JACKSON: Just one moment. I'll let you examine him.

MR. MUSLEH: You just let him finish what you've asked him. (to the witness) Did you finish your answer?

MR. JACKSON: Your Honor, I asked him, "Do you remember what you told him?", "Yes, I remember what I told him"

Q. You tell me, and that jury, that you did not see Mr. Smith step on Mr. Owens' foot?

A. I didn't tell you then that I saw him step on his foot.

Q. And you're not telling me now?

A. No, I'm not telling you now that I seen him step on his foot.

Q. All right, now, didn't you say at that time that when you looked up you saw Mr. Owens and Mr. Smith talking together, didn't you?

MR. MUSLEH: Hold it, hold it, don't you answer that question. Now, your Honor please, I object at this time to the purpose of counsel's asking what was his testimony at a previous trial and, obviously, the purpose of counsel in asking that question would be for the purpose of impeaching the witness' testimony. In order to impeach the witness' testimony, counsel must then lay proper predicate and foundation for such impeachment which includes not only a certified transcript of his testimony by the court reporter but a furnishing of what certified transcript both to this Court and to this prosecuting attorney. Now, if he intends to impeach his testimony, he must relate to the page at which the question was asked and repeat, verbatim, the question asked from the certified copy of the transcript. So, now, based upon this factor not having been complied with by counsel then I object to any question being asked as to what he might have said at a prior trial unless the proper predicate has been laid by counsel.

MR. JACKSON: Your Honor, as far as counsel's first statement, I would like very much for him to give the rules of procedure and show where counsel is required to furnish the Court and him with a certified copy of a transcript before I can ask a question from the transcript that was taken by the official court reporter. Now, if he finds it in writing, I'll eat that word.

MR. MUSLEH: Well, you got a lot to eat, brother.

MR. JACKSON: Now, the next thing is that the reporter who took this report was one that was requested by the Court to appear and take this testimony. I haven't at this moment put it in evidence because it hasn't been necessary to put it in evidence. I think I can ask the questions to refresh this witness' memory relative to a prior statement and ask him to state what he said at that time. Now, when it comes to proving to the contrary, I think, then, that's the time that I'll have to lay the predicate to put it in, sir.

MR. MUSLEH: He cannot ask this witness any question as to any prior testimony until he puts that transcript of record into evidence and he has to put a certified copy of that transcript of record into evidence and ask the question verbatim as it appeared in the certified copy of the transcript. Now, he's not at liberty here now to ask any questions about any other trial unless he sets a predicate here for impeaching this witness.

THE COURT: The Court is going to sustain the objection on the proper predicate not being laid.

Q. **MR. JACKSON:** Mr. Windsor, now, I know that you want to tell the truth to this jury, right?

A. That's what I'm trying to do.

Q. That's all I want. I'm not trying to get you to say anything that's wrong. Now, isn't it true that when you went into this ticket office, that you were there, waiting for your wife, is that right?

A. That's correct.

Q. And that when you saw this talking and so forth you gathered around?

A. Sure.

Q. You said that the officers told you to leave?

A. That's right.

Q. You never have before this date said that you stood shoulder to shoulder with Mr. Owens and confronted any of the defendants, have you?

A. Nobody didn't ask me.

Q. I see. In fact, when I asked you the first question about where were you standing you said you all were four or five feet apart, didn't you?

A. When---

Q. Just a while ago.

A. When we first seen them, yes.

Q. You were sitting on the seat when you first seen them, is that correct?

A. When we seen the bus stop and they got off, yes, we were setting.

Q. You said you were sitting there when the bus stopped and they got off. You said a moment ago that you were seated when they came through the door, isn't that right? You didn't say that?

A. I might have.

Q. Well, I'm going to ask you now, was that true or was that false?

A. Yes, we were setting on the seat. We got up to meet the bus.

Q. You got up then after you saw this defendant come through the door, isn't that right?

A. They were right at the door and we met them going out.

Q. Now, just one moment. You are going much too fast for me, Mr. Windsor. You see, there is something known as space and time. Now, you were either here at one particular time and that's when the defendants walked through the door. or you weren't. Now, were you there?

A. We was when the bus stopped and the fellows got out and come in through the door, yes.

Q. Just a moment. The bus didn't stop all at one time and the people got off all at one time. I'm trying to get it broken down into chronological order, if you please. Now, were you there when the bus stopped, you were seated inside when the bus stopped?

A. Yes.

Q. Were you there when the defendant walked through the door, were you still seated?

A. We were getting up to meet the bus.

Q. Had you gotten up?

A. Well, who would know?

A. I'm asking you. You should know.

A. Well, I wouldn't have any eccasion to remember that. You don't remember these little things.

Q. Well, you are telling this jury what happened and we were not there, the Judge was not there, Mr. Musleh wasn't there, this jury wasn't there. You are recapitulating a scene and we've got to rely upon what you say. Now, I ask you, were you seated when these men came through the door or weren't you?

A. We was getting up, I would say, to meet the bus because I was expecting somebody on the bus. That's what you usually do when you meet a bus.

MR. JACKSON: That's all right. Your witness.

MR. MUSLEH: That's all.

(Court recesses for five minutes)

(Court then adjourned for the day)

(In the absence of the jury)

(Second day of trial)

(Counsel arguing a question of law concerning the calling of Mr. Owens as a hostile witness)

THE COURT: The Court is going to deny the motion and will take judicial knowledge that there are several witnesses who have not been called for either side, who were present at the alleged incident. You may proceed, counsel.

MR. JACKSON: We will call Mr. Owens, sir.

(Thereupon the jury returned)

MR. JACKSON: Your Honor, we are now calling this witness as a hostile witness and upon that at the proper time would ask the Court, if necessary, to give us the privileges or to examine this witness accordingly.

MR. JOHN OWNES, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. **MR. JACKSON:** State your name, please.

A. John Owens, John H. Owens.

Q. Where do you live, Mr. Owens?

A. In Ocala, Florida.

Q. Were you at the Bus Station on June 16, 1961?

A. Yes.

Q. Would you tell this jury what happened at the instant that you came in contact with an individual by the name of Smith?

A. **MR. MUSLEH:** I object to that, your Honor, It's a leading question and no hostility has been proven on the part of the witness----

THE COURT: Will you rephrase your question, counsel?

MR. JACKSON: I was trying to limit his testimony, your Honor, to the area.

Q. Tell the jury what happened, Mr. Owens?

MR. MUSLEH: I object to that question. It calls for generalities and a conclusion and the State objects to the asking of the question and the manner of its asking.

A. Could you be more specific, counsel?

MR. JACKSON: Your Honor, do you want me to lead him? I told the witness to testify as to what happened at the Bus Station. If that is leading, sir, I don't know what---

THE COURT: Ask a specific question, though, without leading.

MR. JACKSON: I will be glad to.

Q. Mr. Owens, did you come in contact with a person by the name of Smith on June 16, 1961?

MR. MUSLEH: I object to that as immaterial and irrelevant as to the case in point. Whether the witness Smith or the witness Owens came in contact with the witness Smith, as the case that's being tried now as to the defendant Callendar, as it is immaterial and irrelevant, any contact between Owens and Smith.

MR. JACKSON: Yesterday, all day long we talked about Owens, Smith and O'Connor. I wonder when did Smith become irrelevant in this case?

MR. MUSLEH: Well, you called him as a witness. It is now immaterial and irrelevant. Now, he can inquire on Callendar. He's now going into another phase, your Honor, altogether.

MR. JACKSON: Your Honor, counsel has yesterday talked about three people---

THE COURT: Counsel, could you perhaps lay a little more particular foundation for your question and then it would be relevant, I believe. I hate to limit---

MR. JACKSON: Your Honor, you're saying that in asking this witness about Smith, that I'm asking an irrelevant question at this time?

THE COURT: At this time. I would think you should probably tie it in.

Q. All right, Mr. Owens, did you come in contact with anyone while you were at the Bus Station on June 16, 1961?

MR. MUSLEH: I object to that question. It is irrelevant and, if your Honor please, it covers generalities as to who he came in contact with.

MR. JACKSON: Anyone.

MR. MUSLEH: It's too general, your Honor.

THE COURT: The Court overrules the objection.

A. Well, yes, in a way, I came in contact.

Q. Who did you come in contact with, sir?

A. Smith, I believe his name was.

MR. MUSLEH: I object to the question and move to strike the question and answer as to whether he came in contact with Smith. It's immaterial and irrelevant, as defense has not laid the proper predicate and foundation for that testimony at this time.

MR. JACKSON: Your Honor, what kind of foundation must I lay to a witness that was an eye-witness----

THE COURT: The Court overrules the objection. You may answer.

A. Yes, I answered it.

Q. Explain to the jury what happened when you came in contact with Smith on June 16, 1961.

MR. MUSLEH: I object to that as immaterial and irrelevant. No proper predicate or foundation has been laid and it is immaterial to the issues of the defendant Callendar being unlawfully----

THE COURT: What was the question again?

REPORTER: (reads last question)

THE COURT: You're going to tie this up later, aren't you?

MR. JACKSON: Yes, sir, I'm going to tie everything up.

THE COURT: All right, the Court will overrule the question on that basis.

Q. **MR. JACKSON:** Would you mind answering this?

A. Well, Smith stepped on my foot as I was going out the door and I wanted him to apologize. I pulled my foot out from under his and I was going out the door with him or walking on towards him and he was backing up to it, so I think that answers your question.

Q. Did you see at that particular time Mr. Windsor?

A. No, not at that particular time.

Q. Did you see Mr. Windsor on this particular day?

A. Yes.

Q. Where did you see him?

A. Well, he was there about the time we went out the door. He was coming out the door or was right behind us as I turned around to - the officers asked us to leave and I turned around and looked the situation over, so I was outside the door, was starting out when Mr. Windsor come on up to the door or just out; I don't remember just which.

Q. Was anyone with Mr. Windsor?

A. Well, there was several there. I don't know exactly - Mr. Penuel was there.

Q. Mr. Penuel was with you?

A. No.

Q. Did he come up near you?

A. Well, he was there close by. I don't know just how close he was.

Q. Was he standing next to your shoulder?

A. Well, he could have been or he could have been a few feet away but I saw him there.

Q. Who did you see in front of you at the time you say Smith bumped into you?

A. Well, Smith was the only one right then and later on O'Connor come along and looked like he wanted to pull Smith by his arm over me.

Q. What did O'Connor tell Smith?

A. He told him the lunch counter was this-a-way.

Q. He was trying to pull him to the lunch counter, wasn't he?

A. I think he was hungry, yes.

Q. Now, you saw at that time Smith and O'Connor, is that right?

A. Yes.

Q. When did you first see this defendant?

A. Just as I got outside the door.

Q. And where was he?

A. Just outside the door on my right.

Q. He was standing outside the door?

A. Yes.

Q. Did you ever see him inside of this waiting room looking at you, shoulder to shoulder with O'Connor and with Smith?

A. No, I didn't because O'Connor was - I was looking at Smith and O'Connor and it looked like I said that O'Connor was trying to pull Smith over me so I was watching the two of them.

Q. But you never saw Callendar?

A. No. He could have been there but then I didn't see him.

Q. Did you and Mr. Windsor - who is the other fellow that you said was up there?

A. Mr. Penuel.

Q. Did you three gentlemen stand shoulder to shoulder?

A. No.

Q. Never did?

A. Not that I can remember. They may have been trying to get out about the time I was there but then, as I said, I didn't see everything that went on because I was watching Smith and O'Connor.

Q. What I'm trying to say, did you three men stand shoulder to shoulder and did three other men - O'Connor and Smith and Callendar - stand shoulder to shoulder and you three were looking at each other like this?

A. Well, as I said, I didn't see Callendar at the time because I had my eyes on two.

Q. Did Callendar ever touch you or touch anybody that you were able to observe that particular day?

A. Well, just as we got outside the door there was a little shoving there and he could have touched someone.

Q. I said, did you see it?

A. To swear particularly, I couldn't.

Q. You couldn't swear under oath?

A. No.

Q. You wouldn't swear under oath, would you?

A. No, not that he touched anyone.

Q. Did you see him that daywith a camera around his neck, a little camera?

A. He had one in his hand, or something, that someone said was a camera. Now, I don't know.

Q. You saw it?

A. Yes, I saw something that was visible.

Q. You saw him standing on the outside, out here, if this would be the door, he was standing outside this door?

A. One foot or maybe two feet outside the door.

MR. JACKSON: That's all.

MR. MUSLEH: The State now, your Honor, moves to strike all testimony of the witness, other than his name and address on the grounds, Number One, the witness was called as a hostile witness and there was no hostility proven on the part of counsel for the defendant, of this witness and the State now moves to strike that portion of the testimony, in the event the Court denies that from his name, or until the time which the witness says he saw the defendant Callendar outside the door and the defense failed to tie this matter up as he told the Court he would do. So, now, the first motion, now, this has been called as a hostile witness. There's no hostility whatsoever proven on the part of this witness. Now, the rules provide that when you call a hostile witness you must set a predicate for calling the hostile witness and he must show his hostility on the stand. He has failed to do that and the State now moves the Court to strike his entire testimony except for his name and address.

THE COURT: The Court will deny the first motion.

MR. MUSLEH: Now, as to the second motion, up until the time that the witness claims he saw Callendar outside of the Bus Station, the State moves to strike all of the testimony of what transpired as between the witness and Smith and O'Connor in the Bus Station as this is immaterial and irrelevant as to the charge as to whether the defendant Callendar did unlawfully assemble there. Now, he's testified as to what took place between him, Smith and O'Connor inside the Bus Station and the State moves to strike that part of the testimony----

MR. JACKSON: Your Honor, this witness, according to the State's testimony yesterday, they had this defendant here with two other----

THE COURT: Let the jury retire.

(In the absence of the jury)

THE COURT: Proceed, counsel.

(Counsel arguing)

THE COURT: The Court is going to deny the motion to strike.

MR. MUSLEH: At this time, your Honor, the State now moves that the Court instruct James O'Connor and Lesley Lee Smith to remain in the confines somewhere in the Court, as the State intends at this stage of the trial to call these two as rebuttal witnesses and we ask now, if your Honor please, that both be instructed as---

MR. JACKSON: Mr. Smith is not here but Mr. O'Connor is.

MR. MUSLEH: What happened to Smith, you got rid of Him?

MR. JACKSON: Yeah, he went back.

MR. MUSLEH: O'Connor is in here and I'd like to ask you to instruct O'Connor to remain in the confines of the Court and not to leave until this Court excuses him, as the State intends to use O'Connor at this time as a defense witness and would you place him under the rule at this time.

THE COURT: Mr. O'Connor, would you come forward, please, sir

(Mr. O'Connor coming up to the bench)

(Court instructing him as to his duty
as a witness and swearing him)

(Thereupon the jury returned)

CROSS EXAMINATION

Q. **MR. MUSLEH:** Mr. Owens, to see if the jury and I understand your testimony correctly, you had an altercation with a Lesley Smith, is that right?

A. Yes, sir.

Q. Will you describe the manner of his clothing at that time? Do you remember that?

A. His clothing?

Q. Yes.

A. Well, he had on a black suit, I believe it was a serge or of that type and one of those high Minister's collars, is about all I remember.

Q. Now, you have had the occasion, have you not, to observe this man since that date, June 16th?

MR. JACKSON: Your Honor, I'm going to object for this being cross examination on the part of the witness in that it does not conform in connection with direct examination that was made by counsel.

MR. MUSLEH: We have a wide latitude. He's identified Lesley Lee Smith, your Honor. I'm going to ask for his identification of Lesley Lee Smith.

THE COURT: The Court's going to sustain the objection as to the question as to his being observed since that time.

Q. **MR. MUSLEH:** Have you seen him since that time?

A. Yes.

MR. JACKSON: Objection again.

THE COURT: Objection overruled.

Q. How many times have you seen him?

A. I wouldn't know exactly but several times. He was here yesterday, I believe.

MR. JACKSON: Your Honor, let me say this. I am saying that the testimony that counsel is now asking from this witness is not covered by my direct examination.

MR. MUSLEH: Your Honor, I've got a wide latitude---

MR. JACKSON: Now, I've had the same question before this Court before and counsel has always insisted that the Court rule that I stay within the framework of my direct examination. Whether Smith was here yesterday or Friday before has nothing to do with my examination. My examination was about Smith and this was in connection with his purpose at the Bus Terminal and no other place, sir.

MR. MUSLEH: Your Honor, the State doesn't even know if he knows Smith. We've got to show here whether the man can identify Smith.

MR. JACKSON: I think the witness has said that he identified him and knew him and, of course what was said here the other day does not make further identification necessary.

THE COURT: I don't think the question so far has been properly----

Q. **MR. MUSLEH:** When was the last time you saw him?

A. Yesterday or the day before.

Q. Let's go into this other person, O'Connor. Do you remember the manner of dress, the clothing he had on this particular June 16, 1961?

A. Not exactly the clothing that he had on. He was dressed with some sport clothes on but to describe them, I couldn't.

Q. Have you seen him?

A. Yes.

Q. How many times since June 16th?

A. Well, I saw him all through his trial and then I saw him this morning and also yesterday.

Q. Now, did you see the defendant here, Callendar?

A. Yes.

Q. When was the first time you saw him?

A. At the Bus Station.

Q. When?

A. June 16th.

Q. How many times have you seen him since?

A. I expect a dozen times.

Q. Where was that at?

A. Here about the courtroom.

Q. Other than in the Court and the Bus Station have you seen the defendant Callendar?

A. No, not except around the grounds here at the courthouse.

Q. In your altercation, as you testified on direct examination, that was with the one that had the black collar, the preacher's collar?

A. The white collar.

Q. The white collar. That's the one you had the altercation with?

A. Yes.

Q. Describe the manner of altercation that you had with him.

A. Well, he walked in at the Bus Station door, in the waiting room as I was going out----

Q. Would you look at the board here, please, and step down and show the jury. This has been identified as the west door, this is the waiting room, this is the concrete walk, this is the bus. Will you show the jury where you were?

A. Well, I was approximately right here, at this little arrow.

Q. About, in distance, how far were you from the west door?

A. I would say about five feet.

Q. Would mind, right there - turn around, Mr. Owens, please - would you demonstrate for the jury now, using me now, for example here. Are you this far from me, closer or what?

A. Yes, just about that far.

Q. Are you this far from the west door?

A. Yes, just about.

Q. Now, where was Smith at, in between you and me? Now, this is the door here. Where was Smith at?

A. Well, Smith walked in as I was stepping out and shoved the door open and came right on in on me.

Q. Smith then came on in to you in this close proximity that I am to you now, is that correct?

A. Well, closer, really.

Q. Well, this close, close enough to step on your toe?

A. Yes, something like that.

Q. And what happened between you and Smith? Will you demonstrate to the jury, please, using me as an example?

A. Well, he came in and stepped on my toe and I looked up at him - of course, I saw him before - I pulled my foot back and put up my hands like this and he backed back.

Q. He backed in the direction of west towards the door?

A. Yes, towards the door.

Q. What did you do with your hands now?

A. Well---

Q. What'd he do with his hands?

A. Well, as I say he had his hands up like this.

Q. Like this?

A. Yes.

Q. All right, go ahead.

Q. So I put mine up the same way.

Q. Did you ever come into physical contact with each other?

A. Well, we was just about touching each other.

Q. About like that?

A. Yes.

Q. All right, go ahead, what happened then?

A. And then O'Connor came around and hollered and told him that the lunch counter was this-a-way and grabbed him by the arm and pulled him up closer.

Q. O'Connor came around - would that be in a northerly direction here?

A. No, he came this way.

Q. This way?

A. Supported by, well, it would be Smith's left arm.

Q. Then, at that time, would your attention have been focused in the direction that O'Connor was in?

A. Yes, at that time I looked at O'Connor.

Q. In that direction?

A. Yes, to the right of me.

Q. Then what happened then after O'Connor came around? Will you demonstrate for me the manner in which he grabbed Smith's arm to go into the door? Will you demonstrate that for me?

A. Well, he came right up from behind, a little bit behind Smith and called him to the lunch counter this-a-way.

Q. Did Smith run into you at that time?

A. Yes, he pulled him direct into me----

Q. Into you?

A. ---with a slight pull.

Q. Was your eye still focusing on Smith and O'Connor?

A. Yes.

Q. Now, what happened then? Return to your seat.

A. About that time the Law came up.

Q. Who is the Law that came up?

A. Deputy Sheriff Geiger.

Q. Tell me what he did.

A. Well, he told us fellows to---

Q. He told who, "us fellows" who?

A. Me and Smith and Mr. Windsor and Mr. Penuel at that time to get on out of there and leave.

Q. And who else did he tell that?

A. Well, he told Smith and O'Connor and I forget his name,----

Q. Callendar?

A. ----was in there - of course, I didn't see him at the time- to get back on the bus.

MR. JACKSON: Objection. If you didn't see him, how can you say he told Callendar.

Q. **MR. MUSLEH:** Did you see Callendar in the station at that time?

A. No.

Q. From what direction do you remember Geiger came up when you, Smith and O'Connor was having this altercation or shoving, which direction did he come from, from your front or from your back or from your side?

A. From the back.

Q. From the back?

A. Yes.

Q. Did he put his hands upon you, Mr. Geiger?

A. Yes.

Q. When he put his hands on you, what did he do?

A. He told me to leave the premises.

Q. Did he sort of help you leave through that door?

A. Yes.

Q. When you got outside on the concrete walk, which is outside the Bus Station through the west door, did you see Callendar?

A. Yes.

Q. How did you recognize him, how do you remember it's him?

A. Well, I've recognized people all my life and it's very easy to recognize one from the other.

Q. Well, how do you recognize him?

A. Well, the first thing I noticed was his goatee, I believe you call them.

Q. He had his goatee on then?

A. Yes, he had his goatee on then.

Q. When you got outside the Bus Station with Mr. Geiger and this crowd, what did Mr. Geiger tell you to do?

A. He told me to get going.

Q. Well, did he tell also Penuel and Windsor to get going?

A. Yes, they was almost behind me or right up with me at that time.

Q. At that time was Callendar there?

A. Yes, he was just outside the door.

Q. Well, did he tell Callendar?

A. Yes, he told Callendar, O'Connor and Smith to get back on the bus.

Q. Now that was a time there was no altercation, the officer was there and you had a chance to make your observation, is that right?

A. Yes.

Q. Up until the time that you were walking out the door, you came into physical contact with Smith?

A. Yes.

Q. O'Connor came around in this direction and grabbed Smith's arm, correct?

A. Yes, he came around on Smith's left and it would be my right, facing him.

Q. Would you have any occasion at that time with the two men before you in this altercation to look to see whether or not there was anybody else standing there?

A. No.

Q. You said, I believe, in response on direct examination Callendar could have been inside but you don't know, is that correct?

A. Yes, he could have been inside.

REDIRECT EXAMINATION

Q. **MR. JACKSON:** Mr. Owens, when you first approached the door to the Bus Station, you said that one man came through the door?

A. Yes.

Q. And that man stepped on your foot, is that correct?

A. Yes.

Q. Then you said behind him was another man, right?

A. Yes, sir.

Q. Who was that other man?

A. O'Connor.

Q. Now, did you see this defendant come through that door? Tell this jury.

A. No, I didn't see him come through the door.

Q. You didn't see him and you were facing them as they came in the door, weren't you?

A. Yes.

Q. You could have seen who came through that door, couldn't you?

A. No, I could have---

(counsel and witness talking simultaneously)

MR. MUSLEH: Objection. He's arguing with his witness, his witness, your Honor. The Court hasn't declared him as being hostile. He's arguing with his witness and I object to him arguing with his witness.

THE COURT: Overruled.

Q. **MR. JACKSON:** Isn't that right, Mr. ----

A. Well, I had my eyes on Smith and O'Connor, as I stated.

Q. You had your eyes focused on the men who were confronting you, is that correct?

A. Yes.

Q. And if Callendar had been confronting you, you would have seen him too, wouldn't you?

A. Well, he wasn't right there.

Q. I see.

A. In other words, he could have been around there but I didn't see him.

Q. But he wasn't right there where those other two men were?

A. He wasn't right in between them or right up to them.

Q. I see. Now, Mr. Owens, you were able to see Mr. Windsor in there, right?

A. After I looked back.

Q. After you looked back?

A. Yes.

Q. Now was he standing shoulder to shoulder with you?

A. He was either shoulder to shoulder or just back of me.

Q. He was behind you?

A. He could have been shoulder to shoulder or just back of because I was watching the other two men at the time.

Q. Where was this other fellow he was with standing?

A. He was right there in---

Q. Was he shoulder to shoulder too?

A. Well, I wouldn't say that either one was shoulder to shoulder but almost. They could have been, right there, or just back.

Q. Now, did you throw your hands up and tell Smith that he couldn't come in there?

A. No.

Q. Did you say anything about "Niggers can't eat in here", or something?

A. No.

Q. Did you say any other thing?

A. Not about that.

Q. If Mr. Windsor said that, he's not telling the truth, is that right?

A. I don't know about what Windsor said.

Q. I said, if he said it, he's not telling the truth, is that right?

A. I wouldn't call a man a liar.

Q. Well, did you say it or didn't you?

A. Well, now, I never said that.

Q. Well, that's what I'm asking you. You were the man there----

MR. MUSLEH: I object to this line of questioning; it's argumentative and counsel is arguing with his own witness.

THE COURT: Answer the question if you can, sir, so we can proceed.

A. About all that I was after was wanting him to apologize for stepping on my foot and that they----

Q. Mr. Owens, I'm asking what did you say?

A. Well, I didn't say it.

Q. You didn't say it?

A. No.

Q. Now you said just a while ago that Mr. O'Connor pushed Smith back into you?

A. Pulled him into me.

Q. You say he pulled him into you?

A. Yes.

Q. Now, you remember testifying before in connection with this same case on July 6, 1961?

MR. MUSLEH: The State objects, your Honor, because since the Court has ruled that this is not a hostile witness, then the rules must apply now of impeaching your own witness.

The counsel is now attempting to impeach his own witness so the State objects, as it's basic, fundamental law that in the trial of criminal cases you cannot impeach your witness. The Court did not declare him as a hostile witness and the Court so read that into the record.

MR. JACKSON: I tried very hard to explain to the Court the basis upon which I said hostility exists------I do think and know that if this witness takes a statement that is inconsistent with a prior statement that on the basis on which I called him to the stand I have a right to impeach him under that basis because I forewarned the State and asked the Court to preserve that right for the defense.

MR. MUSLEH: Once this witness was called and this Court has ruled now, in overruling the previous State objections, that the defense did not show the hostility of the witness nor has a Court ruled him as being a hostile witness, then he must be treated in the light as he was a witness, a defense witness, for the defense. Being so, and the Court has so ruled, that he cannot impeach his own witness' testimony.

THE COURT: Are you attempting to lay a proper foundation, counsel, for such----

MR. JACKSON: Yes, sir, I was trying to get the record that has been filed in the Court, a copy of it sent to counsel, of the certain case of the State of Florida versus James Richard O'Connor that was taken by the court reporter.

MR. MUSLEH: Your Honor, excuse me, for the benefit of the record, I haven't got the Court's ruling on my motion objecting to him impeaching his own witness.

THE COURT: Well, the Court is overruling that objection.

(Court recesses for five minutes)

MR. JACKSON: Now, for the record, I hold here a certified copy of the transcript of testimony, reported by Miss Joan E. Toby who was the court reporter in connection with the case of the State of Florida versus James Richard O'Connor. I now read, your Honor, from page 64 of that report.

MR. MUSLEH: Let the State again be specific in renewing its objection that the defense is attempting at this time to impeach his witness and the State objects to any pursuance by the defendant of the impeachment of his witness.

THE COURT: Overruled.

MR. JACKSON: Mr. Owens, I am going to read a portion of the transcript of testimony that was taken when you were testifying in the other case.

MR. MUSLEH: Will you specify what case?

MR. JACKSON: The case of the State of Florida versus James Richard O'Connor.

MR. MUSLEH: What line are you reading from?

MR. JACKSON: I am reading between line 5 and 6, beginning on page 64.

"Q. Now, what did Rev. Smith do?

A. Well, he stood there and looked at me a little bit and started backing up and O'Connor had pulled him by his arm, telling him about the lunch counter which was back of him.

Q. In other words, Mr. O'Connor took a-hold of Rev. Smith telling him the lunch counter was this way?

A. Yes.

Q. And started going in that direction?

"A. Yes.

Q. Now, when you said they were there, you were inside of the place at that time, is that right, you were still inside of the premises, is that right?

A. Yes.

Q. Did you start to walk out the door?

A. Yes, I, at the time, was right at the door.

Q. In other words, you were fixing to leave Rev. Smith and Mr. O'Connor, is that right?

A. Well, I was at that time waiting for him to apologize to me, Smith.

Q. But where was Smith standing then?

A. Well, he was always in front of me, between me and the door.

Q. When you started to walk out of the door, did that make Rev. Smith back up to the door that you were going out?

A. Yes, he was backing up.

Q. Backing up, out of the way?

A. Yes, he was backing up. Either I had shoved him a little, one or the other. Now I am pretty sure I had shoved him a little when I was leaving.

Q. The only contact then, you say, was when the person bumped into you, you shoved him back off you?

A. Yes."

Q. Was that true?

A. Yes.

Q. This is a true recollection of what happened?

A. Yes.

Q. Now, you made a statement about where Mr.Callendar was standing. You said that he could have been inside, that's what you inferred to the Court? Is that right?

A. Yes, he could have been, There could have been a lot of people there that I couldn't have seen because I was watching the other fellows.

Q. Now, do you remember this, do you remember testifying to this on the same day, at the same trial and I am reading now from page 69, line 9:

"Q. Do you recall seeing a fellow there with a camera standing outside there?

A. Yes.

Q. Would you tell the Court and jury about where he was standing?

A. Well, he was approximately three feet outside the door and two feet to the right as you go out the west door.

Q Did you ever see him come inside the door there?

A. No, sir.

Q. Would that person be Mr. Callendar that was with these other people?

A. Well, I don't know him real well but you know, well, I would say that it was, because I have seen him outside with these other people.

Q. Is that the fellow that you have seen outside with them? I'll ask him to stand."

MR. JACKSON: And you remember I asked him to stand?

WITNESS: Yes.

MR. JACKSON: And then the question was-

"Q. Is that the fellow there?

A. Yes.

Q. That is the fellow that you saw standing out here on the outside with a camera, is that right?

A. Yes."

Q. Now, is that correct?

A. Yes, that's correct.

Q. Then you never said at that time that you ever thought or imagined that he was inside the place, did you?

A. No, but we wasn't trying Callendar at that time. We was on another case.

Q. But the same testimony as to what happened then stands before the jury as correct, doesn't it?

A. Well, yes, if it had been asked.

MR. JACKSON: That's all.

MR. MUSLEH: Now, the State moves at this time to strike from the record all questions propounded by counsel for the defendant in reference to any prior testimony as the same was not used for any purpose of impeachment nor does the same constitute in any manner any testimony that this witness has offered today. He had to lay a predicate or foundation and, Your Honor, it hasn't been laid and I move to strike it and ask the Court to instruct the jury to disregard it.

THE COURT: The Court will deny the motion.

RECROSS EXAMINATION

Q. MR. MUSLEH: At that time when you were being inquired by counsel, did he ask you, could Callendar have been inside the building, at any previous trial?

A. Yes, I believe he did.

Q. What was your answer?

A. The same as I said now, that he could have been.

MR. MUSLEH: That's all.

MR. JACKSON: The defense rests, your Honor.

MR. MUSLEH: Your Honor, in view of the time, the

State would like to adjourn this until 1:30-

(counsel explaining reasons for requesting adjournment)

(Court recessed until 1:30 P.M.)

MR. MUSLEH: The State is ready to call a rebuttal witness.

(Thereupon the jury came in)

MR. MUSLEH: Let the record show that the State is calling James Richard O'Connor as a rebuttal witness and as a hostile witness and will lay the foundation for such hostitlity before the Court.

(the jury retires)

MR. MUSLEH: I would like now to lay the predicate or foundation, if your Honor please, to show the hostility of this witness.

Q. State your name.

A. James Richard O'Connor.

Q. What is your address?

A. 170 West 89th Street, New York City, New York.

Q. Mr. O'Connor, you were previously called to testify on behalf of the State of Florida in the prior trial of unlawful assembly of the State of Florida versus Lesley Lee Smith, at which time, upon advice of your counsel, did you refuse to testify on the grounds of the Fifth Amendment and took the Fifth Amendment at that time?

A. That's correct.

Q. Do you still feel that the same conditions prevail now as prevailed at that time on your refusal to testify?

A. Would you be more specific with respect to the definition of the word "condition"?

Q. Well, why did you refuse to testify when the State called you before?

A. Because I thought it might prejudice my trial which was coming up the next day.

Q. Would you state what the Fifth Amendment of the Constitution contains and the grounds you used in failing to testify?

MR. JACKSON: Objection, your Honor. The Question as to what the Fifth Amendment- the State thinks the question of law as it applies to any case is to be construed by the Court. I think counsel asking this witness of a layman's interpretation of the Constitution, I don't think that's a relative question as to whether or not he has any opinion at all. I think it is done primarily for the purpose of embarrassing this witness and I think that should not be tolerated by the Court.

MR. MUSLEH: Your Honor, he said he refused to testify upon the grounds of the Fifth Amendment. Now, he has invoked the Fifth Amendment. I am now asking him what the Fifth Amendment is that he refused to testify previously upon. It goes to find out the hostility of this witness. He was the one who used the Fifth Amendment.

MR. JACKSON: Your Honor, this witness has already stated that at the time that the State wanted to put him on as a witness that his case, growing out of this same situation was to follow the following day and, because it had not been tried, he felt that whatever he said would have been prejudicial to this case. He has already made that statement to the Court. I think that suffices and should suffice.

MR. MUSLEH: He has not yet made the statement to the Court at the time, your Honor. Let's get to the record and it's available to the Court. When he was called to the stand the only thing that he would utter was that he refused to testify on the grounds of the Fifth Amendment and I would like to call the Court's attention to the Fifth Amendment and that it has no application to a State Court whatsoever. He refused, and the State did not pursue it and I'd like to ask him now upon what grounds or what is the interpretation of the Fifth Amendment that he's refused to previously testify. Now, I'm doing this in the absence of the jury to show his hostility before this Court. Now, the jury is not available to listen to his testimony. You can't embarrass the man when the jury's not here.

MR. JACKSON: Your Honor, as I said before, if counsel desires to prove the hostility of this witness, he does it by virtue of the fact that this witness does not want to testify, not what his reasons are but that he does not wish to testify. Second, that the witness has already stated why he did not wish to testify at that time. He has not said, at this time, that he objected to testifying and I think the question as to whether he is hostile at this time is the question before the Court, not yesterday or day before.

MR. MUSLEH: I've got to show here hostility. We base his hostility, not upon his actions now but upon the previous actions before this Court.

MR. JACKSON: You've just finished arguing that about Mr. Owens and said that didn't apply.

THE COURT: The Court is going to ask the witness to answer the question if he knows.

Q. MR. MUSLEH: What is the Fifth Amendment, Mr. Witness, that you've used to refuse to testify when you were called by the State before?

A. I don't remember the exact wording of the Fifth Amendment but I believe in the Fifth Amendment there is a clause which says that a person accused of a crime or a person who has a trial scheduled, doesn't have to testify against himself or if that testimony should in any way possibly incriminate him.

Q. And that was your construction of the Fifth Amendment?

A. Very roughly, yes.

Q. Beg pardon?

A. I said, roughly, yes.

Q. And, upon that basis, is the reason you refused to testify, is that right?

A. That's correct.

Q. Now, let me ask you this. Are you acquainted with this defendant?

A. Yes, I am.

Q. When did you become acquainted with him?

A. When did I first meet him?

Q. Yes.

A. I first met him approximately 9 weeks ago.

Q. Prior to June 16, 1961?

A. Correct.

Q. What is your profession or occupation?

A. I teach economics at Barnard College at Columbia University in New York City.

Q. Are you stating that you are actually an instructor in economics?

A. That's correct.

Q. Do you hold any degree of professor?

A. No, I don't.

Q. You're merely an instructor?

A. Correct.

Q. On the first occasion, then, when you met the defendant, Callendar, was sometime prior to June 16, or approximately 9 weeks ago, is that right?

A. Correct.

Q. And since then have you traveled with him back and forth between New York and Ocala?

A. No, I have not traveled from New York to Ocala with him.

Q. Have you traveled any place with him since June 16, 1961?

A. I traveled from Washington, D. C., to Ocala, actually, to Tampa, with Mr. Callendar.

Q. Now, have you developed a friendship with this defendant here?

A. I'm proud to call him my friend, yes.

Q. Now, because you are proud to call him your friend, do you have any reluctance to testifying against him, this defendant here, whom you proudly call your friend?

A. I'm not quite sure what you're driving at but I'm going to tell the truth up here, if that's what you mean.

Q. Well, I'll tell you something. You being an instructor at a college, I'm assuming that you can understand simple language, isn't that right? Do you have any degree?

A. Yes, I have a Bachelor of Science degree.

Q. And where is that from?

A. Columbia.

Q. Having a Bachelor of Science degree from Columbia University, can you understand simple language of whether you have any reluctance now to testify against your friend Callendar or must I get a college instructor to interpret that question to you?

A. I thought I answered it when I said I have no reluctance to tell the truth. I have a reluctance to lie. That's all I can answer your question, sir.

Q. Would you answer my question again or I'll have to ask the Court to instruct you. Do you, or do you not, have any reluctance now to testify against this defendant, Callendar? Either you do, or you don't.

MR. JACKSON: Now, your Honor, I object to questions again directed to this witness because to allow it amounts to merely badgering the witness. The witness has clearly stated, and the question is not now is who is capable of attempting what. When he said, testify against a person, does he mean to tell a lie against the person or does he mean testify as to the truth which is involved in the situation. This witness has said that he's willing to testify and has no reluctance to testify about the truth. Now, if he wants to call it against--that is up to the prosecution.

MR. MUSLEH: Well, the prosecution has called it against and I still ask you to answer the question. Do you have any reluctance to testify? This is a case of the State of Florida against- and, professor, we use the word "versus". You are sure you know what that means? The State of Florida against Herbert Ebenezer Callendar. Do you have any reluctance to testify as a State's witness against Herbert Ebenezer Callendar?

MR. JACKSON: Again, your Honor, I declare that the word-----

THE COURT: Mr. Muslah, you might probably go a little deeper into that question----

MR. MUSLEH: Well, your Honor, I'm going to have to express my ignorance here because I don't know how to detail any more than by simple asking this man, in the case of the State of Florida against - the affidavit or warrant says, first, "versus" which is opposing two opposite groups - the State of Florida against Herbert Ebenezer Callendar. Does he have any reluctance in testifying as a State's witness against the defendant? That is all the question, either he does or he doesn't.

MR. JACKSON: Your Honor, as I said before, the question is whether or not this witness has any reluctance to testify in this case, as a State witness. That's all he could say. Whether he be for or against is a question for the jury to say whether it's for or against. How can this witness say I'm going to testify for or against anybody?

THE COURT: The Court's going to overrule the objection.

Q. MR. MUSLEH: Would you answer the question now?

A. I will answer it in detail because I can't answer it in general. I have no reluctance to testify "against Herb Callendar" if my testimony was the truth and the truth led to a picture or situation unfavorable to Herb Callendar. That's my answer. Obviously, I'm not going to lie.

Q. We hope not.

MR. JACKSON: Well, you called him as a witness and you vouch for his veracity.

MR. MUSLEH: I didn't vouch for anything. That's why I called him as a hostile witness, counsel.

Q. Now, other than this one trip to Washington, have you ever counseled with the defendant in the presence of his attorney?

A. Counsel means spoken?

Q. Yes.

A. I have spoken with Mr. Callendar in the presence of his attorney, yes.

Q. On how many occasions has that been?

A. Oh, roughly - individual occasions?

Q. Yes.

A. Oh, probably between 30 or 40.

Q. Thirty or forty times?

A. Include lunch, smoke breaks, that sort of thing.

Q. Did you discuss the facts surrounding the circumstances of this case with the defendant, in the presence of his counsel?

A. Yes, I have.

Q. Would you, should the State use you was a witness here, would you speak the truth as to these facts?

A. I have already said six times that I will speak the truth, sir.

Q. How long have you been associated with Columbia University?

A. As a student and as a teacher, approximately eight years.

Q. Let's get at it as a teacher.

A. This is my fourth year coming up.

Q. Your fourth year, as an instructor of economics?

A. Correct.

Q. Are you working on any other degree now at Columbia?

A. Yes, I am.

Q. What are you working on?

A. Doctorate's Degree.

Q. Do you have your Master's Degree?

A. No, I do not.

Q. Well, then, how are you going from a Bachelor's to Doctor's degree?

A. At Columbia it's possible to go from a Bachelor's to a Doctor's degree.

Q. That's only possible at Columbia then?

A. It's probably possible at other schools too.

Q. Let me ask you this. At this particular point, you have sat in Court and heard both the trials, besides your trial, and Smith's trial, have you not?

A. Correct.

Q. You've heard my arguments that I've presented to the jury in both cases in detail, have you not?

A. Yes I have.

Q. What is your feeling toward me, then, at this time, now, as prosecuting attorney?

MR. JACKSON: Your Honor, I object to that. That has nothing to do with his hostility, to testify in this case unless the prosecutor says he's the State. This is the case, State versus Callendar and the only persons in this case happens to be the State and Callendar. The prosecuting attorney, defense counsel and other parties in the Court are not a part of this case and when we become parties to it, then we must take sides and now which side are we on?

THE COURT: The Court will overrule the objection.

Q. MR. MUSLEH: What are your feelings toward me as prosecuting attorney?

A. My feelings toward you as prosecuting attorney?

Q. Yes, sir.

A. I have no feelings toward you as prosecuting attorney.

Q. What are your feelings toward me individually now, from your observations here in the courtroom and outside?

A. My observations of you in the courtroom and outside?

Q. Yes, If you are going to be honest, you know, are going to tell the truth, let's hear it.

A. Well, my most basic impression of you, sir, is that you are somewhat of a clown.

Q. Clown?

A. Yes.

Q. Go ahead.

A. You want me to characterize you in detail?

Q. Yes, sure. I have characterized you before and I think you are entitled to the same thing.

THE COURT: The Court has heard sufficient. The Court will declare the witness a hostile witness.

MR. MUSLEH: Thank you sir.

(Thereupon the jury returned)

THE COURT: I believe Mr. O'Connor had just been called to the stand.

MR. MUSLEH: May I ask the Court now to announce to the jury its finding as being declared as a hostile witness--

MR. JACKSON: Objection, your Honor. I think that the only thing this Court can announce is this witness' testimony as he gives it.

MR. MUSLEH: Your Honor, the witness must receive that testimony as the Court declares----

MR. JACKSON: You have nothing to do with what the declaration of the Court is as to the witness' status.

MR. MUSLEH: Yes, sir.

MR. JACKSON: Can you show it to me?

THE COURT: The Court feels that the only difference is the manner of handling the witness.

JAMES RICHARD O'CONNOR, having been duly sworn testified as follows:

DIRECT EXAMINATION

Q. **MR. MUSLEH:** State your name.

A. James Richard O'Connor.

Q. What is your address, Mr. O'Connor?

A. 170 West 89th Street, New York City, New York.

Q. What is your profession or occupation?

A. I am an instructor of economics at Barnard College Columbia University in New York City.

Q. Is that a coeducational college or is that a school for girls?

A. Barnard College is primarily a girls school but there are men students in the class from Columbia college.

Q. Do you know the defendant sitting at the table?

A. Yes, I do.

Q. When did you first meet him?

A. Approximately 9 weeks ago.

Q. Where at?

A. Washington, D.C.

Q. Did you journey with this defendant to Ocala, Florida on June 16, 1961?

MR. JACKSON: Now, your Honor, the defense rise to make a motion, that this witness is called as a rebuttal witness and, as such, he must rebut what I brought out on direct and he cannot go beyond the scope of that examination. I brought nothing out on my inquiry as to defense about where these people were or where they came from.

MR. MUSLEH: Now, your Honor please, I feel that on "vor dire" examination counsel asked the jury would they consider the fact that he was from Jacksonville and his client from New York.

MR. JACKSON: That has nothing to do with the scope of the rebuttal that is supposed to be put on by the State. That does not increase the scope of the rebuttal. The rebuttal is limited to rebutting what I brought out by my examination.

MR. MUSLEH: That's what we're doing.

MR. JACKSON: All right, that's all.

MR. MUSLEH: We're going to do it.

THE COURT: The Court is going to sustain the objection as to any other place.

Q. MR. MUSLEH: On June 16, 1961 - you are acquainted with Lesley Lee Smith, are you not?

A. Yes, I am.

Q. On June 16, 1961 did you and Lesley Lee Smith, and the defendant, Herbert Ebenezer Callendar arrive in a bus at the Ocala Bus Terminal on or about noon of that day?

MR. JACKSON: SAME objection, your Honor. I brought nothing out about these defendants' arrival from any source on my examination, sir.

MR. MUSLEH: Your Honor, his whole defense is that he was not in there, that Ebenezer Callendar was not in the Bus Station.

MR. JACKSON: My whole defense that he was not in there, that's true, but I didn't say anything about him arriving.

THE COURT: Overrule the objection.

Q. Will you answer the question?

A. Would you repeat the question, sir?

REPORTER: (repeats question)

A. Yes, I did. I believe it was June 16.

Q. Now, did you go into the Bus Terminal at Ocala, Florida?

A. Yes, I did.

Q. Who accompanied you into the Bus Terminal?

A. Lesley Smith.

Q. Was Callendar on the bus, as you stated arrived here, was he with you at that time?

A. He was not inside the terminal with me, no.

Q. When did he get inside the terminal?

A. He wasn't inside the terminal.

Q. Well, now, who left the bus first?

A. I did.

Q. Then, Smith was behind you?

A. Smith was, perhaps, well, getting off the bus, obviously he was behind me.

Q. He was behind you?

A. Walking to the station, walking to the door of the waiting room, he was roughly next to me.

Q. This has been identified as the west door of the waiting room. Did you and Smith enter into that door at the same time?

A. Roughly the same time.

Q. Roughly, how many people got off the bus at the same time as you and Smith and Callendar and so forth got off?

A. I don't know.

Q. Can you give the Court any idea?

A. Well, there were perhaps 30 to 35 people on the bus. I was the first off. I didn't turn around to look and see.

Q. You didn't turn around to look and see?

A. Who got off besides myself and Rev. Smith.

Q. But you and Rev. Smith entered in the door at the same time? Is that correct?

A. Roughly, the same time.

Q. Now, you didn't look back to see who all was coming into the Bus Station, did you?

A. Well, I didn't look back, no, but---

Q. Did these 30 or 35 people get off the bus behind you? Did they?

A. Pardon me, what's the question?

Q. Did these 30 or 35 get off the bus behind you?

A. I don't know. Some obviously did.

Q. Some of them obviously did. And if you were the first one to get off the bus and you and Lesley Smith were the first two to enter into the Bus Station door, then obviously these people were behind you, is that right?

A. That's correct, they were behind me on the bus.

Q. Then you don't know whether Callendar was behind you as you entered into the Bus Station or not, do you?

A. Yes, I do.

Q. Well, how do you know that?

A. For the simple reason that we didn't get that far into the Bus Station. We only got about a couple of feet in the station.

Q. Well, how did you know who was behind you when you got a couple of feet in the station?

A. Well, if somebody had been behind me, especially in that situation----

Q. Well, what situation? Tell us about it. What situation are you talking about?

A. You want me to describe the events of the day?

Q. That's up to him. I'm asking. This is rebuttal. Describe the events at the Bus Station.

A. Where would you like me to start?

Q. When you walked into the Bus Station along with Smith, and there were some people behind you, will you concede to that, that you were not the only two that got off the bus?

A. I already said that other people got off the bus. I've also said that Herbert Callendar wasn't in the station because we were so close to the door that it would have been, for all practical purposes, impossible for anybody to be between myself and the Rev. Smith and the door.

Q. Well, now, you are saying that when you went into the door, you went in with Lesley Smith, correct?

A. Right.

Q. Now, when you got inside the door, the other people who entered the Bus Station would have been behind you and Lesley Lee Smith, is that correct?

A. The other poeple who entered the Bus Station?

Q. You said other people got off the bus.

A. I didn't say that other people entered the Bus Station.

Q. Did anybody else enter the Bus Station other than you and Lesley Smith?

A. I don't know that. They might have entered the Bus Station after Lesley Smith and I were pushed out of the door, told to leave out on the platform. At that time, what happened in the Bus Station, I'm ignorant of.

Q. Well, just tell us - yeah, I agree with you, you're ignorant of a lot of things - just tell us what happened in there?

A. Lesley Smith and I got a couple of steps, a couple of feet, perhaps, inside the Bus Station.

Q. Which way was Lesley Smith, to your left or right?

A. He was to my right.

Q. To your right. All right.

A. And a man, later identified as Mr. Owens, approached Lesley Smith and said something to him.

Q. What did he say to him?

A. I don't know. All I know is that it was said in a bit of a hostile tone. What he said, I don't know, I can't remember.

Q. In a spirit of what kind of a tone?

A. A hostile tone.

Q. A hostile tone. All right, go ahead.

A. I thought I saw the sign to the cafeteria off to my left. Since I haven't been back in the Terminal I don't know whether the cafeteria is where I thought it was but I took Lesley by the arm and pointed to the cafeteria and said to him, "There's the cafeteria, let's eat", or words to that effect.

Q. Where was Owens, at that time?

A. Owens was directly in front of Smith.

Q. Owens and Smith came into physical contact with each other at that time?

A. I did not see them, no.

Q. You did not see them?

A. No.

Q. And yet Smith was right next to you, shoulder by shoulder and you couldn't see that?

A. We weren't shoulder by shoulder and, anyway, I didn't see Smith come into contact with Owens. But, don't you see, I was looking toward the cafeteria.

Q. This west door that you went through, did you and Smith go through the door at the same time or one behind the other?

A. We were, roughly, at the same time, as I said.

Q. Side by side? And then you met this guy Owens and if there was any scuffling you couldn't see it?

A. Look, I've already finished saying that I was looking for the cafeteria----

Q. You were looking for the cafeteria?

A. ----and my eyes were not on Smith all the time. In fact, I took his arm when I saw what I thought was the cafeteria sign.

Q. If your eye wasn't on Smith all the time, how do you know whether Callendar was in there or not?

A. Well, because-----

Q. You couldn't tell whether Smith, your companion, was in there.

A. I knew Smith was there. I didn't say he wasn't there but-----.

Q. Did you not just say that you couldn't tell whether Smith was there at the time because you had your eyes on the cafeteria, is that your testimony?

A. I did not say that.

Q. You didn't say that?

A. No.

Q. What did you say, let's hear it.

A. I said that I couldn't tell whether there was any shuffling or body contact between Owens and Smith.

Q. Would you demonstrate to this jury, Mr. O'Connor, right here, and use me here in place of Mr. Smith, the manner.

in which you headed into the Bus Station. In going through the west door, now, was I on your left or right?

A. Well, first of all, there are two doors.

Q. All right, did we go through separate doors?

A. I really don't remember.

Q. You don't remember whether you went through one door or you went through separate doors, is that your testimony?

A. I really can't remember.

Q. All right, was I on your right or on your left?

A. You were on my right.

Q. OK. We walk into the Bus Station. All right, now, what happened here with Owens, what happened?

A. Owens was either sitting or standing by the side, He approached you, Smith.

Q. In front of me?

A. In front of you.

Q. OK.

A. My eyes, for a moment, how long a moment I don't know, was off to the left.

Q. Off to the left.

A. And I took him by the arm like this---

Q. You did?

A. ---and said, "Lesley, there's the cafeteria inside there"

Q. Now, when you took the arm and said, "Lesley, there's the cafeteria", you couldn't tell whether there was any scuffling whatsoever between Owens and Smith, yet he was right next to you, is that your testimony?

A. Well, the scuffling might have taken place before I took his arm.

Q. Now, let me ask you this question. If you were inside- now, you say you were inside the Terminal now, is that correct?

A. That's correct.

Q. You were the first one off the bus, right?

A. Right.

Q You and Smith entered the station approximately the same time, correct?

A Correct.

Q. You were approximately how far in the door, now?

A. A couple of feet.

Q. A couple of feet in the door and Smith was next to you when you got inside the door, correct?

A. Roughly next to me, not shoulder to shoulder, but as we demonstrated, yes.

Q. Well, Mr. O'Connor, maybe I missed this demonstration, but you exhibit us as being shoulder to shoulder. Was that right or wrong.

A. I wasn't touching you, sir.

Q. Well, approximately how far were you from me?

A. Oh, 3 or 4 inches.

Q. Three or four inches. OK. And you are 3 or 4 inches, now, from Smith. Owens walks to Smith, is that right?

A. That's correct.

Q. And then why did you grab Smith's arms to take him and show him this is the cafeteria?

A. Why did I grab his arm?

Q. Yes. You demonstrated by grabbing hold of my arm. Why did you grab his arm and say, "This is the cafeteria"?

A. I suppose it was a natural motion.

Q. What kind of natural motion? Did you grab his arm to get off of the bus?

A. No, but I've seen you grab peoples' arms and put your arm around people's shoulders in this courtroom. I think it's a natural motion.

Q. Was Owens standing right in front- you weren't in love or anything with Smith, were you?

A. No, I was not.

Q. And Owens was standing in frontof Smith, was he not?

A. Yes.

Q. Did you grab his arms to go around Owens?

A. That's correct.

Q. Then how can you tell who was behind you at that time?

A. As I say we were right next to the door, a couple of feet from the door.

Q. And you can swear who, on the bus, 30 some people, had gotten off and come in behind you at that time, is that right?

A. I don't understand the question, sir.

Q. Can you swear that he was not in the Bus Station or in the door, at the time you grabbed Smith's arm?

A. Well, since I was right next to the door, I'd say-knowing how difficult it is to swear absolutely to anything- I think it's possible to swear absolutely to this as it is to anything- yes, because I was right next to the door.

Q. That's about the biggest triple negative you'll ever come out with. Can you, or can you not swear, that Callendar was not in the Bus Station or he was in the Bus Station?

A. Perhaps, yes, I can swear that he was not in the Bus Station.

Q. When did you first see Callendar now? Wait a minute. Can you also swear that you didn't see any commotion or any shoving at all between Owens and Smith, can you swear to that?

A. Yes, I can swear that I didn't see any shoving or commotion between Owens and Smith.

Q. You can swear to that?

A. Yes, sir.

Q. All right, now, you was never over 3 or 4 inches apart, right?

A. That's correct.

Q. When you grabbed Smith's arm to go to the cafeteria, were you going towards the door of the cafeteria?

A. I was going in the direction I thought the cafeteria was.

Q. Assuming this man in the middle is Smith, assuming this man here, as you demonstrated, is O'Connor, you, and assuming that the cafeteria door is here, would you have been going in this direction, which would have been to your right, when you grabbed Smith?

A. Well, two things, first, this was the first time I had ever been in the Ocala Bus Station and so, as I said before, I wasn't sure where the cafeteria was. I said I thought I saw a sign saying cafeteria. I still don't know whether it was there. Second, Owens, as I said , was right in front of Smith and it just seemed easier to go around Owens to the left. This was reinforced by the fact that I thought the cafeteria was in that direction. There were other people around, so----

Q. There were other people around? What other people?

A. What other people?

Q. Yeah.

A. People who -well, let me continue the narrative. When I took Smith's arm, a second or two later, a number of gentlemen, let's say, three, gentlemen, descended upon us and told us to move out and then sort of edged us out, pushed us out of the Bus Terminal. And so, I didn't get very far. That's the answer.

Q. Did these three gentlemen who descended upon you touch you in any way?

A. No, they didn't touch me.

Q. Did they touch Smith in any way?

A. No, I didn't see them touch Smith in any way.

Q. Could they have touched Smith and you not seen them?

A. Pardon me?

Q. Could they have touched Smith and you not seen them?

A. Possible.

Q. Possible. Suppose, Mr. O'Connor, that the jury goes down and sees nothing but a blank wall at this spot here which is the place you testified you were looking at, then how can you explain that you thought the cafteria was there?

A. As I say, I don't know. It was the first time I had been in the Terminal, there was a gentleman confronting Smith, I didn't want any trouble, nobody wanted any trouble, and, obviously, I didn't see the exact location or the correct location of the cafeteria.

Q. You classified or attempted, on June 16 yourself, as a "Freedom Rider"?

MR. JACKSON: Objection, your Honor. That was not brought out on direct examination.

THE COURT: Sustained.

Q. How many other people did you see go into the Bus Terminal other than you, Smith and O'Connor who were aboard the bus.

A. My name is O'Connor.

Q. I ask you. All right, how many did you see, other than you three?

A. What three? Would you repeat that? You said, "you Smith and O'Connor". My name is O'Connor.

Q. Well, I'll tell you something now. I've committed an unpardonable sin calling someone else your name. Let me say, you, Smith and Callendar. Now, did you see anybody else get off that bus and go into the Bus Terminal?

A. As I said before, Callendar didn't go into the Bus Terminal.

Q. I asked you did you see anybody else go into that Bus Terminal that was on that bus?

A. Nobody but Smith and myself.

Q. No one else went into the Bus Terminal, out of the 30 or 32 on the bus?

A. I did not see anybody else go into the Bus Terminal.

Q. You didn't see anybody. When the officer came up there, now, what happened. What happened, then, when the officers came up.

A. When the officers came up inside or outside the Terminal?

Q. Where did you first see them at?

A. A man who was later identified as an officer, I saw him first inside the Terminal.

Q. What did he tell you?

A. He said, "Move out, move out", or some words to that effect.

Q. What did you do?

A. Moved out.

Q. Did the officer touch you?

A. Not that I can remember. He might have, I can't remember.

Q. You can't remember whether he touched you?

A. No.

Q. Did you move outside the Bus Terminal then?

A. Yes, I did.

Q. And what did the officer tell you outside the Bus Terminal?

A. He said, "Get back on the bus".

Q. And what was your reply?

A. I told him that we were - or I was, anyway - on the bus since that morning and that this was a regular lunch stop and that I wanted to eat in Ocala.

Q. How many times did he tell you to get back on the bus?

A. I don't know. Roughly, three or four, maybe, I don't know.

Q. Was your reply the same each time?

A. Yes.

Q. Did this officer or any officer in your presence tell any of the other 32 to get back on the bus, in your presence?

A. In my presence, he addressed that question to Smith, yes.

Q. Now, when did you first see Callendar?

A. Outside on the platform.

Q. Outside on the platform?

A. Yes.

Q. And how far was that from the door?

A. Well, I first saw Callendar roughly six or eight feet from the door, on the platform.

Q. Did you turn around and walk out the west door of the Bus Terminal?

A. Did I turn around?

Q. Yeah, or did you back out?

A. Well, to tell you the truth, I can't remember whether I backed out or turned around, since, as I said, there were a lot of people and I didn't know what was happening, to tell you the truth.

Q. You didn't know what was happening?

A. I didn't know what was happening.

Q. That's about the gist of your whole testimony, isn't it, Mr. O'Connor, that you don't know what was happening?

A. In my opinion, no, it isn't.

Q. Well, isn't it about the truth, Mr. O'Connor, that you, a college professor, have remembered only details that would be beneficial to this defendant and have deliberately, and I use that word deliberately, attempted to forget those details that would be harmful to the defendant and isn't that the truth?

A. No, it's not.

Q. It's not. Let me ask you this. Since you're under oath, you believe in God, do you not? Do you?

A. I consider myself an agnostic.

Q. And what is an agnostic?

A. One who doesn't know whether he believes in God or not.

Q. Then why have you taken this oath. Did the Court administer an oath to you?

A. That's right.

Q. Did you take that oath?

A. Yes, I did.

Q. That oath meant nothing to you, isn't that right?

A. It meant everything to me.

Q. Everything, such as that if you don't know if there is a God or not?

A. That's right.

Q. What did that oath mean to you?

A. It meant that I swore that I would tell the truth and not lie.

Q. The last words of that oath was "So help me God". Did that have any meaning to you?

A. So help me God. Yes, it does, it has a symbolic meaning.

Q. A symbolic meaning. Would you explain that, please? What is a symbolic meaning?

A. Well, it means to myself. If I say, I'm not going to lie, so help me God, I'm talking about my personal God. I don't know who he is or what he is or whether he exists. He may be just my own conscience and my own morality but the point is, when I say it, I mean that I am not going to lie.

Q. And you feel that you have a personal God, over James Richard O'Connor, which is not the same God as the rest of the Universe, is that right?

A. I really don't know.

Q. You don't know. You are an instructor in the University of Columbia, is that correct?

A. That's correct.

Q. With this belief, you are an instructor? Of children.

A. You see, we are a little more liberal minded than you are.

Q. Liberal minded? I'm going to ask this question. What is liberal? What is your termination of liberal?

MR. JACKSON: Your Honor, I believe this is getting into argument. If counsel wants to argue this question before the jury-----

MR. MUSLEH: I won't agree with you, I won't agree with you-----

MR. JACKSON:---We believe that a witness not be badgered on the stand and what the impression they are to obtain from his testimony, they are here to observe, sir. I do not believe in trying to go between their thinking. These men are adults. They are able to think for themselves.

MR. MUSLEH: I agree with counsel because I am so shocked at this testimony that I would move to strike every bit of it from the record.

THE COURT: The Court is going to sustain the objection.

MR. MUSLEH: I move, your Honor, to strike every bit of testimony of this witness from the record on the grounds that this Court administered an oath to him prior to his testifying, which he took, and with the words "so help me God", is the essential and is really the exempligying portion of that oath, when, in fact, this man doesn't believe that there is a God and yet he is not competent and that should have been disclosed to the Court prior to his taking and we have provisions in the Law for those people who take that position. So this oath meant absolutely nothing to him, and I move to strike all of his testimony from the record.

MR. JACKSON: Now, your Honor, I am going to object to two things, one, I'm going to make a motion to declare this a mistrial because of the derogatory statements made in the presence of this jury which in my opinion is, in fact, prejudicial, Number two this witness was called by the State and the State should certainly take the responsibility for calling him to the stand. Number three, in our form of jurisprudence, we have always recognized the fact that a man could take the oath. He did not say he did not believe in God or a God, as long as he believed in a superior being and whatever that may be and I defy counsel or anyone else who can say he, himself, knows what that God is. We just have faith that there is that God and we believe in it and that's all we can hope to do.

THE COURT: The Court will deny the State's motion to strike and the Court will deny the defense's motion for mistrial.

CROSS EXAMINATION

Q. **MR. JACKSON:** Mr. O'Connor, if I understand you correctly, you said that you and Smith entered this particular Bus Terminal approximately at the same time?

A. Yes.

Q. Did you see any other person next to you or alongside you at that time?

A. No.

Q. You could have seen a person if they had been shoulder to shoulder with you, could you not have?

A. Yes.

Q. Now, the next thing is, the prosecution asked you, the next question, could you swear whether or not Mr. Callendar was in the Terminal. I think you said it made it difficult for you to swear anything, only to swear to what you saw, is that correct?

A. What I saw and what I could deduce from my position inside the Terminal.

Q. Now, in other words, when you said you swear that Mr. Callendar was not in there, you mean, judging from the area where you were, I mean, the area around you and the distance from the door, that he was not in that vicinity, is that correct?

A. That's right.

Q. Now, when did you first see Mr. Callendar after you were outside of the building?

A. I saw him on the platform probably 15 or 20 seconds after I was talking with the police officer.

Q. Did Mr. Callendar have anything with him?

A. He had a camera with him.

Q. Did he have his camera at that time?

A. He had his camera with him. I think it was slung over his shoulder.

MR. JACKSON: That's all, your Honor.

REDIRECT EXAMINATION

Q. MR. MUSLEH: Let me ask you one question. Have you now, or have you ever been, a member of the Communist Party?

A. No.

MR. JACKSON: Objection, your Honor.

MR. MUSLEH: The State rests.

MR. JACKSON: Your Honor, I have the same three instructions, of course, at this time. I would say that I make the same motion as I made in the first and second cases, without using up the Court's time and I think your Honor can consider it on the basis of---

THE COURT: I don't have those here now, counsel.

MR. JACKSON: Well, I have a copy.

MR. MUSLEH: Can we assume you are going to give the same instructions as you did on the prior case?

MR. JACKSON: These are the same that you denied before, sir-----

MR. MUSLEH: For the benefit of the record, I will stipulate that those have been requested and have been denied.

THE COURT: For the record, the Court will deny defendant's request for instructions 1, 2 and 3 and is including previous charges given in the other cases.

(Arguments before the jury)

COURT'S CHARGES TO THE JURY

Gentlemen of the jury, this is the case of the State of Florida versus Herbert Ebenezer Callendar in which it is charged that on the 16th day of the month of June 1961 in Marion County, State of Florida, one Herbert Ebenezer Callendar did unlawfully meet with two other persons, to wit, James Richard O'Connor and Lesley Lee Smith, to commit a breach of the peace, contrary to statute in such cases made and provided and against the peace and dignity of the State of Florida.

Now, you have heard the evidence in this case, and the argument of the attorneys. It now remains for me to give you in charge the law which applies to this case and it is your duty to accept the law as I define it to you and to apply it to the evidence as you"ve heard it from the witness stand. The defendant is presumed to be innocent and such presumption remains and abides with him throughout every stage of the trial unless and until removed to your satisfaction by competent evidence beyond a reasonable doubt.

The defendant is entitled to the benefit of every reasonable doubt which may arise in your minds from the evidence or lack of evidence in the case and you cannot convict him of the crime charged unless you are satisfied of his guilt beyond such reasonable doubt. Now, a reasonable doubt is defined to be that state of a juror's mind where, after having heard and carefully considered all of the evidence in the case, he cannot say that he has an abiding conviction to a moral certainty of the guilt of the accused. Such doubt, however, as its name implies, must be a doubt that is reasonable, one which reasonable men entertain after fully considering all the evidence and one which arises from the evidence or the lack of evidence in the case and not a mere possible or speculative doubt.

It is incumbent upon the State to prove to your satisfaction beyond a reasonable doubt, by competent evidence, every material allegation in the affidavit before you can convict the defendant of the crime charged. You are the sole judges of the testimony and the credibility of the witnesses. It is your duty, if you can, to reconcile all of the testimony, without imputing to any witness a want of truthfulness. But, in considering and weighing the testimony of the witnesses and each of them, you have the right to take into consideration their manner of testifying, and their interest, if any, in the subject testified about and to believe or disbelieve any or all of such testimony, according as you think it worthy of belief.

The number of witnesses does not control the jury's verdict. You may believe or disbelieve one against many or believe or disbelieve many against one. You are to decide this case on the credibility of the witnesses, taking into consideration their manner of testifying, their attitude and conduct upon the stand, and their interest, if any, in the subject testified about.

Under the law, no accused person shall be compelled to give testimony against himself and an accused's failure to testify shall not be used against him nor should his failure to give testimony be considered by you. You should consider this case solely upon the evidence presented from this witness stand.

The Court will instruct you that the affidavit is merely the formal manner by which the defendant is brought into court and is not evidence in this case and the fact that there is in evidence an affidavit filed is not to be considered by you in ascertaining the guilt or innocence of the defendant.

The Court further instructs you that if you find that the defendant is an interstate passenger traveling on a bus that stopped at a regular Bus Terminal and if you find that the defendant was in the process of using the facilities of said Bus Terminal in an orderely, non-violent manner, and that there were no acts of intimidation and disorder as are likely to produce danger to the tranquility and peace of the neighborhood, and have a natural tendency to cause rational, sane, firm and courageous persons in the vicinity to apprehend a breach of the peace, then you must find the defendant not quilty. The section of the law involved is Chapter 870.02 of the Florida Statutes, which reads as follows:

> "If three or more persons meet together to commit a breach of the peace, or to do any other unlawful act, each of them shall be punished by imprisonment not exceeding six months or by a fine not exceeding five hundred dollars."

Unlawful assembly is defined as a meeting or a gathering of persons, three or more, with a common intent, formed before or at any time during the meeting, to mutually associate with one another in the execution of a common purpose, lawful or unlawful, which would interfere with the rights of others by committing such acts of intimidation and disorder as are likely to produce danger to the tranquility and peace of the neighborhood and have a natural tendency to cause rational, sane, firm and courageous persons in the neighborhood, which would be the vicinity, to apprehend a breach of the peace.

It is not necessary to this offense that the design or purpose be executed or put into execution but it is necessary that the defendant and the other persons named in the affidavit attempt or threaten or attempt to use force to obtain their purpose.

The Court further instructs you on the question of intent on the part of the defendant, that the law presumes that every person intends-----and ordinary consequences of his acts. Wrongful acts knowingly or intentionally committed generally cannot be justified on the ground of innocent intent. Ordinarily the intent with which one does a criminal act is not proclaimed by him and, ordinarily, there is no direct evidence from which a jury may be satisfied from declarations of the defendant himself as to what he intended to do as he did a certain act. And this question of intent, like other questions of fact, are solely for you to determine from the evidence in the case. Previous acquaintance between the defendant and the others named is not necessary, nor is it necessary that each person named in the affidavit should have seen the others or have knowledge as to who all the members of the purpose are. It is not essentail that the parties meet or that they confer and formulate their plan nor that each defendant and the others named have knowledge of the scope of the purpose or the means by which the purpose is to be accomplished nor that any time should have been set for the accomplishment of the design. Neither is it necessary that the plan of the combination shall embrace in detail in its early stages the various means by which it is to be executed, as it is sufficient that there is a general plan to accomplish the results sought by such means as may from time to time be found expedient. Unlawful assembly implies a concert of design and not participation in every detail of execution and it is not necessary that every person named in the affidavit shall have taken part in every act or know the exact part performed or to be performed by the others in the furtherance of the purpose.

The Court further charges you that before you may convict the defendant on the crime of unlawful assembly, the evidence must convince you, and each of you, beyond and to the exclusion of every reasonable doubt, that they, and each of them, actively and intentionally participated in the unlawful assembly alleged. Mere knowledge, acquiescence or approval of the alleged purpose without the cooperation or the agreement to cooperate, is not enough to constitute one a party to any alleged unlawful assembly. It is not necessary, however, that the State show that each person named participated in each and every single act or element embraced within the purpose but you must believe from the evidence that each person named actively and knowingly participated in the furtherance of the common design as a whole.

You are further charged that, under the laws of Florida, it is not necessary for the State in the prosecution of an unlawful assembly case, either to allege in the information or to prove at the trial, any overt act and you will therefore be warranted in returning a verdict of guilty if you find from the evidence in the case that an unlawful assembly of three or more was established in your minds beyond a reasonable doubt, whether or not any overt act was ever committed by any of the defendants.

The Court would instruct you on section 30.15 of the Florida Statute:

> "Sheriffs, in their respective counties, in person, or by deputy, shall be conservators of the peace in their counties, suppress tumults, riots and unlawful assemblies in their counties with force and strong hand when necessary, apprehend without warrant any person disturbing the peace and carry him before the proper judicial officer that further proceedings may be had against him according to law."

Now, if you find the defendant guilty, the form of your verdict will be, "We, the jury, find the defendant guilty as charge. So say we all". If you find the defendant not guilty, the form of your verdict will be, "We, the jury, find the defendant not guilty. So say we all". In either event, the verdict should be signed by one of your number as foreman. You may now retire to the jury room, select a foreman and consider your verdict.

MR. JACKSON: Now, I would like to object to the last instruction that in the State of Florida, one need not prove an overt act. I believe that there is something that goes along with that instruction which says that, although it is not necessary to prove an overt act, you must prove by sufficient testimony or evidence that there was a design to do an illegal act or an unlawful act. I am not sure as to what phrase it is but I am positive there is some addition to that particular charge and, as given, it gives the idea that one need not prove any overt act at all.

THE COURT: It's the same thing I gave last time, the same charge.

(The Court recesses)

(Jury returns)

THE COURT: Gentlemen, have you arrived at a verdict?

FOREMAN: Yes, sir, we have.

THE COURT: All right, will you hand it to the bailiff? (reading) We, the jury, find the defendant, Herbert Ebenezer Callendar, guilty as charged. So say we all. August 22, 1961, Barton Fletcher Broadhead, Foreman.

MR. MUSLEH: The State will stipulate here with counsel for the defendant that his motion for new trial and his notice of appeal may be dictated into the record now and the Court enter its judgment for the record now, which will save counsel the necessity of coming back down here. If you want to dictate it into the record, I have no objection.

THE COURT: It is so stipulated.

MR. JACKSON: If it please the Court, the defendant would style the matter the State of Florida versus Herbert Ebenezer Callendar,

"Motion for New Trial

Comes now the defendant, Herbert Ebenezer Callendar by his undersigned attorneys and respectfully move the court for a new trial upon the following grounds:

1. Prosecution failed to prove the elements of the charge, to wit, unlawful assembly.

   (a) The required number of persons under the Statute, to wit, three.

   (b) Any act on the part of the defendant that was inconsistent to peace.

(c) A voluntary assembly of the parties.

2. The Court erroneously construed Florida Statute 870.02 as prohibiting the attainment of a purpose lawful or unlawful while the Statute used in its text only the word "unlawful acts".

3. The court, in denying the defendant's motion for a directed verdict at the close of the State's case and at the close of the defendant's case, denied the defendant his Constitutional right to peacefully use the Bus Terminal facilities on a non-discriminatory basis in violation of the equal protection clause Fourteenth Amendment of the Constitution of the United States and in violation of the Interstate Commerce Act section 3 (1), 216 (d), 49 U. S. C. A. section 3 (1), 316 (d)., and in violation of section 15 of the Bill of Rights contained in the Constitution of the State of Florida.

4. That the Sheriff and his deputies denied the plaintiff his Constitutional rights to peacefully use the facilities of an interstate carrier bus terminal, while he was an interstate passenger traveling on said carrier, in violation of the equal protection clause of the Fourteenth Amendment and in violation of the Interstate Commerce Act, section 3 (1), 216 (d), 49 U. S. C.A. section 3 (1), 316 (d).

5. The verdict of the jury was contrary to the evidence.

6. The evidence adduced to the trial was insufficient to submit the case to the jury.

7. The court erroneously applied Florida Statute 870.02 in violation of defendant's Federal Constitutional rights to peacefully use the bus terminal facilities of an interstate carrier while the

defendant was traveling as an interstate passenger. The use of said Statute as herein applied by the court and by the officers violates the equal protection clause of the Fourteenth Amendment and violates the Interstate Commerce Act, section 3 (1), 216 (d), 49 U. S. C. A. section 3 (1), 316 (d).

8. That the application of Florida Statute 870.02 so as to interfere with interstate travelers in the manner involved in this case is a plain violation of the Federal Interstate Commerce Act, in that it cast an undue burden upon Interstate Commerce.

9. The Court prejudiced the defendant's case by refusing to grant the reading of the defendant's requested instructions, to wit, 1, 2 and 3."

MR. MUSLEH: My memory fails me whether you ever moved the Court for a directed verdict after the State rest.

MR. JACKSON: I think that I stated that at the time I made the motion to the Court on the same grounds as I did on the other cases and that the Court would rule as it did before.

THE COURT: I believe he did say that.

MR. JACKSON: Now, your Honor, it's understood that your Honor denied this motion because my argument virtually will be the same argument as I've already argued before, sir.

THE COURT: Yes, I don't see anything new in this.

MR. JACKSON: In order to ask the Court for an appellate bond, I suppose I would dictate at this time the notice of appeal----

MR. MUSLEH: First, the Court has to enter a judgment.

(Defendant comes before the Court and receives judgment)

MR. JACKSON: The State of Florida versus Herbert Ebenezer Callendar,

"Notice of Appeal

The defendant by his undersigned attorney takes and enters his appeal to the Circuit Court of the Fifth Judicial Circuit for Marion County, State of Florida to review the verdict of the jury entered on August 22, 1961, the order denying the defendant's motion for new trial and the sentence imposed by the court on August 22, 1961 and all parties to the said cause be called upon to take notice of the entry of this appeal."

CERTIFICATE

STATE OF FLORIDA)
)
COUNTY OF MARION)

I, Elva C. Woodis, do hereby certify that the case of STATE OF FLORIDA vs. HERBERT EBENEZER CALLENDAR was tried on the 21st & 22nd day of August, 1961; that I was authorized to and did report in shorthand the proceedings and evidence in said cause and that the foregoing pages numbered 1 to 130 inclusive, constitute a true and correct transcription of my shorthand report of the proceedings of said cause.

IN WITNESS WHEREOF I have hereunto affixed my hand this 20th day of September, A. D. 1961.

/s/ Elva Crumpton Woodis
Official Court Reporter

MSS 546 SEDFRE

Callendar, Herbert vs State of New York, 1964-1967

Box 3
Folder 5

State Historical Society of Wisconsin

Please Retain Original Order

Callender v NYC

T 3 Notice of Claim against The City of New York: Section 50e General Municipal Law.

b

JULIUS BLUMBERG, INC. LAW BLANK PUB
80 EXCHANGE PLACE AT BROADWAY, NEW

In the Matter of the Claim of

HERBERT E. CALLENDER

— against —

THE CITY OF NEW YORK

TO: COMPTROLLER OF THE CITY OF NEW YORK

SIR :

PLEASE TAKE NOTICE that the claimant herein hereby make claim and demand against the City of New York as follows:

1. The name and post-office address of each claimant and of his attorney is:

Nathan H. Mitchell
225 Broadway
New York 7, N.Y.

2. The nature of the claim:

Arbitrary abuse of judicial process in the unlawful commitment of claimant to Bellevue Psychiatric Prison Ward by Edward D. Caiazzo, Judge of the Criminal Court of the City of New York, thereby depriving claimant of his liberty without due process of law.

3. The time when, the place where and the manner in which the claim arose:

Approximately 3:30 o'clock in the afternoon, on the 15th day of July, 1964, in Part 1C of the Criminal Court of the City of New York as setforth in "Nature of the claim" above.

4. The items of damage or injuries claimed are:

Ridicule, humiliation, malicious prosecution, mental anguish and deprivation of liberty without due process of law.

That said claim and demand is hereby presented for adjustment and payment.

PLEASE TAKE FURTHER NOTICE that by reason of the premises, in default of the City of New York to pay the claimant the said sum of $ 1,000,000 within the time limited for compliance with the demand by the said City of New York by the statutes in such cases made and provided, claimant intends to commence an action against the City of New York to recover said sum of $ 1,000,000 with interest and costs.

Dated New York July 24, 1964

Respectfully yours,

Claimant

Nathan [illegible] Mitchell
Attorney for Claimant
Office and Post Office Address
225 Broadway
New York 7, New York

INDIVIDUAL VERIFICATION

STATE OF NEW YORK, COUNTY OF New York ss.:

HERBERT F. CALLENDER, being duly sworn, deposes and says: that he is the claimant herein; that he has read the foregoing notice of claim against the City of New York and knows the contents thereof; that the same is true to h own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Sworn to before me, this
24th day of July 19 64

CORPORATE VERIFICATION

STATE OF NEW YORK, COUNTY OF ss.:

, being duly sworn, deposes and says: that he is the of corporation, named as claimant herein; that he has read the foregoing notice of claim against the City of New York and knows the contents thereof; that the same is true to h own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. Deponent further says that the reason this verification is made by deponent and not by corporation is because it is a corporation and deponent is an officer thereof, to wit, its

Sworn to before me, this
day of 19

GJR:rtr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

HERBERT CALLENDER, WALTER FLESH, :
and JOEL MEYER, :

Petitioners, : 64 CIV 2293

-against- : MEMORANDUM OF LAW AND FACT

THE CITY OF NEW YORK, :

Respondent. :

- X

-MEMORANDUM OF LAW AND FACT-

In the instant case, the defendants were arrested on May 14, 1964 in the County of New York, each charged with assault in the third degree. On June 3, 1964, the defendants requested and received a hearing on the charge in Part 1C of the Criminal Court, City of New York. At the end of that hearing, the petitioners' motion to dismiss the charge was denied and the case was set down for trial for June 24, 1964. On that day, it was adjourned to July 23, 1964 and after the case was marked ready for trial, the petition removing the case to the Federal Court was filed.

The petitioners, although they had not yet submitted an answering memorandum pursuant to Rule 9 of the General Rules of the United States District Court, have asked for a hearing. It is difficult for the prosecution to determine exactly what purpose a hearing would serve.

In another case recently, People v. Crayton et al., this same defense counsel filed a petition removing the case to the Federal Court. This petition is factually similar to the one in this case. One of the defendants, namely Herbert Callender, a petitioner in the above mentioned case, is also a petitioner in this case. A similar request for a hearing was made and denied by Judge Cannella of the Federal District Court, Southern District of New York, on the grounds that the petitioners were not entitled to a hearing until a motion to remand had been decided. Counsel, at that time, indicated that he wished to call as witnesses The Honorable Mayor Robert Wagner, Police Commissioner Michael Murphy, The Honorable Lawrence N. Vetrano and others holding office in various governmental departments. It can only be assumed by respondents that the same "witnesses" would again be sought. It is difficult to determine what the petitioners seek to achieve by such requests since their testimony would be totally irrelevant to the issues before this Court. If the petitioner wishes to call the prossecutions' witnesses, a hearing would be a redundancy since one has already been held, a certified copy of which is made a part of this memorandum. The complainant, the prosecution's witness, is not a union official in the Plumbers Union, but merely a laborer. This assault did not take place at the site at which petitioners claim prejudice existed, nor are these petitioners ones who sought employment with such a union. In fact, the petitioners merely are trying to use this Court to gain publicity and have attempted to justify criminal acts such as hereincharged by saying that they are protesting for civil rights.

It appears that the petitioners should first proceed by affidavit to determine their good faith. The purpose of the hearing, it seems, would be the same as that of taking depositions, namely to simplify, and not to complicate, the issues before trial and to save the Court time, U. S. v. Kolesar 313 F 2d 835 (1963). Just as there is no reason to allow petitioners to take depositions when clearly no useful purpose is served, New Sanitary Towel Supply, Inc. v. Consolidated Laundries D.C. NY 24 FRD 186 (1959). Surely, then, a hearing should not be allowed when no useful purpose is served.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

GERALD J. RYAN
Assistant District Attorney
of Counsel

August, 1964

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
- x

HERBERT CALLENDER, WALTER FLESCH and
JOEL MEYER,

Petitioners,

-against-

THE CITY OF NEW YORK,

Respondent.

- x

NOTICE OF APPEAL

Civil Action File
No. 64 - 2293

S I R S :

Notice is hereby given that HERBERT CALLENDER, WALTER FLESCH and JOEL MEYER, the petitioners above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the order of remand and the order denying the requested hearing ~~[illegible] the order affirming the quashing of subpoenaes and prohibiting the taking of depositions~~ entered in this action on by the HONORABLE JUDGE Edward C. McClean ~~[illegible]~~

Dated: New York, New York
Aug , 1964

YOURS, etc.,

JOHN E. SILVERBERG, ESQ.
15 Park Row
New York 38, New York

CHARLES T. Mc KINNEY, ESQ.
165 Broadway
New York, New York

Attorneys for Petitioners

TO: FRANK S. HOGAN
District Attorney
New York County
155 Leonard Street
New York, New York 10013

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
-------------------- x

HERBERT CALLENDER, WALTER FLESCH and
JOEL MEYER,

Petitioners,

-against-

THE CITY OF NEW YORK,

Respondent.

-------------------- x

NOTICE OF APPEAL

Civil Action File
No. 64- 2293

SIRS:

Notice is hereby given that HERBERT CALENDER, WALTER FLESCH and JOEL MEYER, the petitioners above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the order of remand and the order denying the requested hearing entered in this action on by the HONORABLE JUDGE EDWARD C. Mc CLEAN.

DATED: New York, New York
August , 1964.

YOURS, etc.,

JOHN E. SILVERBERG, ESQ.
15 Park Row
New York 38, New York

CHARLES T. Mc KINNEY, ESQ.
165 Broadway
New York, New York

Attorneys for Petitioners

TO: FRANK S. HOGAN
District Attorney
New York County
155 Leonard Street
New York, New York 10013

Rec'd 8/3/64

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

HERBERT CALLENDER, WALTER FLESCH, :
and JOEL MEYER, :

Petitioners, :

-against- : 64 CIV 2293

THE CITY OF NEW YORK, :

Respondent. :

- -x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

GERALD J. RYAN, being duly sworn, deposes and says:

1. He is an Assistant District Attorney in New York County, assigned to the prosecution of the case that was pending in the Criminal Court of the City of New York in which the above entitled petitioners were defendants until this petition was filed.

2. On or about May 14, 1964, petitioners were arrested by members of the Police Department of the City of New York. The said petitioners were charged with violating Section 244 (assault in the third degree) of the New York State Penal Law. On June 3, 1964, in Part 1C of the Criminal Court, City of New York, the defendants requested and received a hearing on the aforementioned charge. Their motion to dismiss the charge after the hearing was denied and the case was set down for trial on July 23, 1964, in Part 2B of the Criminal Court, City of New York. On July 23, 1964, the defense counsel stated he was ready for trial, then asked the Court to set the case down for 2 p.m. The defense counsel between

the time of such request and 2 p.m., filed a petition in the United States District Court, Southern District of New York, pursuant to Title 28, Section 1417, subdivisions 1 and 2 of the United States Code.

3. The petitioners in their verified petition do not allege facts to support their petition but rather submit conclusions based upon fiction rather than facts that are couched and flagrant generalities and concocted and contrived to undermine the integrity of the Criminal Court of the City of New York.

4. (a) The petitioners in paragraph 5A of their petition state that they were "arrested while conducting a peaceful and lawful protest." The sworn affidavits of the complainant and the arresting officer, on file in the Criminal Court instituting the charges there, say otherwise. This is a factual issue to be determined whether this case is brought to trial.

(b) In petitioners' paragraph 5B it is stated that "there appears" that judges of the Criminal Court of the City of New York have abused their powers regarding bail, parole and probation with regard to these cases. These charges are false, completely irresponsible and ring hollow in view of the fact that these petitioners are now out on parole.

(c) In paragraph 5C petitioners cite as "evidence" the arrest of 300 demonstrators in another county on April 22, 1964. Those cases could not conceivably be more irrelevant to the issues before this Court.

(d) In petitioners' paragraph 5D and 5E the petitioners repeated their claim of paragraphs 4 and 5 in somewhat different language but no where do they produce the slightest scintilla of evidence that they will not be given a fair trial.

5. It is evident from the facts related herein that on July 23, 1964, the petitioners acted in bad faith in stating to the Criminal Court, Part 2B, that they were ready for trial and asking that the case be marked ready for 2 p.m., while in effect they were merely stalling for time to file this petition. It is rather their conduct and not that of the Criminal Court that should be questioned. As the annexed memorandum will show, there is no legal basis for the removal of this case to the Federal District Court and that the only basis is the fear that the petitioners have of being held accountable for their actions. The conduct with which the petitioners are charged would be criminal regardless of who undertook such conduct and regardless of what motivated such conduct.

6. Despite the pleas of such able leaders as the Reverend Martin Luther King who, on August 28, 1963, in Washington, D. C., said "In the process of gaining our rightful place we must not be guilty of wrongful deeds," daily we read in the newspapers of a prediction of "a long hot summer" in which are promised many and various types of demonstrations of this sort in the City of New York. In view of these facts we urge upon the Court to act as expeditiously as possible, and accordingly remand the said proceedings to the Criminal Court of the City of New York, County of New York, pursuant to Title 28, Section 1447, subdivision c, of the United States Code.

Gerald J. Ryan

Sworn to before me this

31st day of July, 1964

DOLORES A. KNOPFLE
Notary Public, State of New York
No. 41-7316862 - Queens County
Certificate Filed in New York County
Term Expires March 30, 1966

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

HERBERT CALLENDER, WALTER FIESCH :
and JOEL MEYER,

: 64 CIV 2293

Petitioners,

:

-against-

:

THE CITY OF NEW YORK, :

Respondent. :

- x

MEMORANDUM OF LAW

Facts

On or about May 14, 1964, petitioners were arrested by members of the Police Department of the City of New York. The said petitioners were charged with violating Section 244 (assault in the third degree) of the New York State Penal Law. On June 3, 1964, in Part 1C of the Criminal Court, City of New York, the defendants requested and received a hearing on the aforementioned charge. Their motion to dismiss the charge after the hearing was denied and the case was set down for trial on July 23, 1964, in Part 2B of the Criminal Court, City of New York. On July 23,1964, the defense counsel stated he was ready for trial, then asked the Court to set the case down for 2 p.m. The defense counsel between the time of such request and 2 p.m., filed a petition in the United States District Court, Southern District of New York, pursuant to Title 28, Section 1417, subdivisions 1 and 2 of the United States Code.

The Issue

Whether the petitioners will be given a fair trial in the Criminal Court of the City of New York, County of New York, and whether said petitioners are precluded by the Constitution or the laws of New York State from enforcing in the New York State Court rights under any laws providing for equal rights of a citizen of the United States.

It is the position of the People that the petitioners will not be given an unfair trial in the Criminal Court, City of New York, County of New York, as is contended in the petition. Furthermore, the judges of said court will afford the petitioners equal protection under the law and petitioners will not be deprived of any civil liberties prescribed under the Constitution of the United States or any laws of the United States.

There were no grounds for removal of the instant case unless the Constitution or laws of the state in which the criminal prosecution is pending denied or prevented the enforcement in the judicial tribunals of such state of the equal rights of the accused as secured by the Constitution or any law of the United States [Kentucky v. Powers (1905) 201 U.S. 1, 50 L. Ed. 633, 26 S.C.R. 387, 5 Ann Cas 692]. No where in the petition is there a contention that such laws exist.

Furthermore, the petitioners contend, on information and belief and not upon knowledge, that judges of the Criminal Court have been engaged in improper conduct with regard to these cases. This charge is made without a scintilla of factual basis. Nevertheless, a case may not be removed from State to Federal Court unless some substantive or procedural rule of state law, as distinguished from actions of officials in disregard of state law, deprives a defendant of equal rights [*Virginia* v. *Rives*, 100 U.S. 313.] 28 U.S.C.A. 1443 [see also, *Alabama* v. *Croskey*, 217 Fed.Supp. 947, D. C. Ala. 1963].

Accordingly, the said proceeding should, under the instant motion, be remanded to the Criminal Court, City of New York, County of New York.

Respectfully submitted,

FRANK S. HOGAN

District Attorney
New York County

GERALD J. RYAN
Assistant District Attorney
of Counsel

July, 1964

Rec'd 8/3/64

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

HERBERT CALENDER, WALTER FLESCH AND JOEL MEYER,

Petitioners,

- against -

THE CITY OF NEW YORK,

Respondent.

- - - - - - - - - - - - - - - - - - x

NOTICE OF MOTION
TO REMAND
64 CIV 2293

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of Gerald J. Ryan, Assistant District Attorney in and for the County of New York, dated July 31, 1964, and on all other papers and proceedings herein, the undersigned will move this Court at a term thereof to be held at the United States Courthouse at Foley Square, in the Borough of Manhattan, City of New York, on the 18th day of August, 1964, at 10 a.m., Room 506, pursuant to Title 28, Section 1447, subdivision C of the United States Code, remanding the above entitled action to the Criminal Court of the City of New York, County of New York, for such further relief as the Court may deem just and proper.

Dated: New York, N.Y., July 31, 1964

Yours, etc.

FRANK S. HOGAN

District Attorney
New York County

TO: CHARLES T. McKINNEY, ESQ.
165 Broadway
New York, N.Y. 10006

JOHN E. SILVERBERG, ESQ.
15 Park Row
New York, N.Y. 10038

BERNARD JACKSON, ESQ.
401 Broadway
New York, N.Y.

Attorneys

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

HERBERT CALANDER, WALTER FLESCH and JOEL MEYER,

Petitioners,

-against-

CITY OF NEW YORK,

Respondent.

- x

NOTICE OF SETTLEMENT
64 CIV 2293

Sirs:

PLEASE TAKE NOTICE that an order, of which the within is a true copy, will be presented for settlement and signature to the Hon. Edward C. McClean, Judge of the United States District Court for the Southern District of New York, at the office of the Clerk, United States District Court, Southern District of New York, United States Court House, New York, New York, on the 15th day of February, 1965, at 10:30 a.m.

Dated, New York, N.Y., February 8, 1965.

Yours, etc.
FRANK S. HOGAN
District Attorney
New York County

To:

John E. Silverberg, Esq.
15 Park Row
New York City

Charles T. McKinney, Esq.
165 Broadway
New York City

Bernard Jackson, Esq.
401 Broadway
New York City

Attorneys

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

HERBERT CALANDER, WALTER FLESCH and JOEL MEYER,

Petitioners,

-against-

CITY OF NEW YORK,

Respondent.

- - - - - - - - - - - - - - - - - - - x

ORDER

64 CIV 2293

The City of New York, the respondent in the above-named action, having moved this Court for an order remanding the cause herein to the Criminal Court, City of New York, County of New York, the said cause having been removed from that Court improvidently, and it appearing that the action has been disposed of in this Court.

Now, upon all pleadings and proceedings heretofore had herein, and due deliberation having been had thereon, it is

ORDERED, that the said motion be and the same is hereby granted; and it is further

ORDERED, that the above entitled action be and the same is hereby

REMANDED TO THE CRIMINAL COURT, City of New York, County of New York, and that the Clerk of the Federal District Court, Southern District of New York, be and hereby is directed to mark his records accordingly.

Entered this day of ,1965.

Edward C. McLean
Judge of the United States
District Court

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
- x

HERBERT CALLENDAR, WALTER FLESCH and
JOEL MEYER,

Petitioners-Appellants,

-against-

THE CITY OF NEW YORK,

Respondent-Appellee.

- x

Docket No.
64 C 2293

ORDER TO SHOW CAUSE

Upon the annexed affidavit of JOHN E. SILVERBERG, duly sworn to the day of February, 1965,

LET, the Respondent-Appellee show cause before the HON. EDWARD C. Mc LEAN, District Judge of this Court, at his Chambers, Room 2601, to be held at the Courthouse at Foley Square, in the Borough of Manhattan, City and State of New York, on the day of February, 1965, at o'clock in the noon of that day, or as soon thereafter as counsel can be heard, why an Order should not be made and entered herein, pursuant to Rule 62 (d) of the Rules of Civil Procedure for the United States District Courts, as amended, pending determination of the appeal herein to the United States Court of Appeals for the Second Circuit and restraining the Respondent-Appellee, as well as the People of the State of New York, from any further proceedings in the case of People of the State of New York against Herbert Callendar, Walter Flesch and Joel Meyer pending determination of said appeal, and granting to the Appellants such other and further relief as to the Court may seem just and proper.

Sufficient reason appearing, therefore, let service of a copy of this Order to Show Cause, together with a copy of the papers upon which it is based on the Respondent-Appellee, People of the State of New York, by its attorney herein, on or before the   day of February, 1965, be deemed good and sufficient service.

Meanwhile, and pending the hearing and determination of this motion, the Respondent-Appellee, People of the State of New York, and their attorneys or persons acting in their behalf are hereby stayed from any further proceedings in the case of People of the State of New York against Herbert Callendar, Walter Flesch and Joel Meyer presently scheduled for trial in the Criminal Court of the City of New York, County of New York, Part 2B for February 25, 1965.

ENTER

D. C. J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
--X

ROBERT DANNENBERG, et al.,
EDWIN FABRE, et al.,
ARNOLD GOLDWAG, et al.,
BEATRICE HILL, et al.,
NANCY LEVINE, et al.,

Appellants,

-against-

THE CITY OF NEW YORK,

Appellee.

--X

SIR:

PLEASE TAKE NOTICE that upon the annexed petition of petitioners herein, appearing through undersigned counsel and upon all the pleadings and proceedings heretofore had herein in 5 matters entitled in the United States District Court for the Eastern District of New York, respectively:

____X

ROBERT DANNENBERG, et al.,

Petitioners,

-against- 64 c 188

THE CITY OF NEW YORK,

Respondent.

____X

EDWIN FABRE, et al.,

Petitioners,

-against- 64 c 189

THE CITY OF NEW YORK,

Respondent.

____X

___________________________________X

ARNOLD GOLDWAG, et al.,

Petitioners,

-against- 64 c 190

THE CITY OF NEW YORK,

Respondent.

___________________________________X

BEATRICE HILL, et al.,

Petitioners,

-against- 64 c 191

THE CITY OF NEW YORK,

Respondent.

___________________________________X

NANCY LEVINE, et al.,

Petitioners,

-against- 64 c 192

THE CITY OF NEW YORK,

Respondent.

___________________________________X

a motion will be made in the United States Court of Appeals for the Second Circuit, at the Courthouse, in Room 1705, located at Foley Square, in the Borough of Manhattan, City and State of New York, on the 8th day of March, 1965, at10:00 A.M. in the forenoon of that day, or as soon thereafter as the matter may be heard, for a stay of state proceedings pending determination of the appeal herein, and for such further and different relief as to the Court may seem just and proper.

Dated: New York, N.Y.
March 1, 1965

YOURS, etc.,

JOHN E. SILVERBERG
15 Park Row
New York, New York
One of Attorneys for
Petitioners

TO: AARON E. KOOTA
District Attorney
Kings County
Municipal Building
Brooklyn, New York
Respondent

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT DANNENBERG, et al.,
EDWIN FABRE, et al.,
ARNOLD GOLDWAG, et al.,
BEATRICE HILL, et al.,
NANCY LEVINE, et al.,

Appellants,

-against-

THE CITY OF NEW YORK,

Appellee.

APPLICATION FOR STAY OF STATE PROCEEDINGS PENDING DETERMINATION OF APPEAL

1. All of the above named appellants were arrested on December 16, 1963 and December 30, 1963 at the Board of Education of the City of New York, Brooklyn, New York and charged with disorderly conduct. In addition, many were charged with resisting arrest and one was charged with malicious mischief.

2. Prosecutions of these cases were pending in the Criminal Court of the City of New York, County of Kings, Parts III and I B. There were 46 defendants in all. These defendants attempted a removal to the United States District Court for the Southern District of New York pursuant to Title 28 U.S.C. Section 1443, et seq., which was clearly improper and without any effect whatsoever since Section 1446 (A) requires the petition be filed "in the district Court of the United States for the district and division within which such action is pending." Nevertheless, Criminal Court Judge Aaron F. Goldstein declined to proceed and suggested to counsel that the removal to the Southern District be abandoned and that petitions be filed with the Eastern District. (See People v Goldwag, 42 Misc 2d 356.) The defendants abandoned their removal to the Southern District and on February 24,

1964 filed 5 petitions with the clerk of the Eastern District Court and filed a notice of removal with the State Court and served a notice of removal upon the District Attorney of Kings County.

3. The cases were adjourned from time to time in State Court and eventually some were marked "off calendar" by consent.

The District Attorney has neither sought to prosecute these cases in Federal Court, nor remand them back to the state court.

4. On December 16, 1964 the 5 petitions bearing Docket Nos. 64 c 188 - 64 c 192 were called on the dismissal calendar of the Eastern District Court, before Hon. Chief Judge Joseph C. Zavatt, who reserved decision at that time. On February 10, 1965 and subsequent to this Court's decision of January 26, 1965 in People v Galamison, the petitions were again called before the Chief Judge on the dismissal calendar and remanded to State Court. No representative of the District Attorney's office was present on either occasion. In addition to remanding the cases, the Chief Judge also ordered the clerk to "transfer all the papers filed in this Court" thereby transferring part of the record on appeal, of this appeal authorized by Title IX of the 1964 Civil Rights Law for petitioners whose cases have been removed pursuant to Title 28 Section 1443 and remanded.

5. On February 11, 1965 Notices of Appeal were filed as to each Order of Remand, copies were given the clerk for service on the District Attorney and proper fees paid.

6. On February 17, 1965, Assistant District Attorney, Irving P. Seidman telephoned counsel for appellants and stated that he had received the Notices of Appeal and would like to adjourn any further proceedings in State Court pending a final determination by the Supreme Court of the United States in People v Galamison. Mr. Seidman also stated that he was not anxious to prosecute these cases but that any final decisions would have to be made by the Honorable Aaron E. Koota, District Attorney of Kings County.

7. On February 24, 1965 several of appellants' cases appeared on the calendar of State Criminal Court in Part III thereof before Hon. Judge Benjamin H. Schor. A request was made by both counsel for defendants and the district attorney's office that the cases be marked "off calendar" or adjourned for six months. Judge Schor at first refused to accede to any request for adjournment but finally agreed to a short adjournment to March 12, 1965, Final against the defendants. Mr. Abrahms who is the assistant district attorney in charge of the Criminal Bureau at that time inquired of counsel for the defendants whether a stay could not be obtained from the United States Circuit Court of Appeals for the Second Circuit so that the cases might be marked "off calendar" on March 12, or adjourned for a substantial period of time.

8. That on December 16, 1964 when counsel appeared before Judge Zavatt on the dismissal calendar, Judge Zavatt stated that he would in all probability remand the cases. A request for stay of execution of any order of remand was made at that time as well as a request to consolidate the petitions. Judge Zavatt stated that should he decide

to remand, neither request would be granted. This request was not renewed on February 10, 1965 since it clearly would not have been granted.

9. That at the time of their arrest, December 16, 1963 and December 30, 1963 the appellants herein were lawfully and peacefully assembled at Board of Education Headquarters to petition for a redress of the grievance of racial segregation of the public schools of the City of New York which Negroes are compelled to attend and which in fact afford an education inferior to that given to white pupils. Many of these appellants are the parents of such Negro children. Many appellants are white supporters of such children and also believe that segregation is harmful to white children and unconstitutionally deprives white children of the right to an integrated education.

10. That State Court Judges clearly have the right to conduct a trial and issue warrants and other processes over the objection of defense counsel and the district attorney. That should a trial be conducted herein, these appellants would be denied the very right so recently granted by virtue of Title IX of the 1964 Civil Rights Law, i.e., the right to appeal an order depriving them of a federal trial in the first instance. Subsequent to a State trial in the first instance this right would be moot and academic.

11. That appellants herein at the time of their arrest were all members of and officially representing various organizations including, the National Association for the Advancement of Colored People's 13 Metropolitan Branches, the Congress of Racial Equality, the Harlem Parents' Committee and the Parents' Workshop for Equality. Also supporting these demonstrations was the National Urban League.

12. Stays pending determination of appeal have twice been granted by this Court in the case of People v Galamison, Docket Nos. 29166-29175 on August 25, 1964, by Hon. Judge Thurgood Marshall and on September 1, 1964 by Hon. Judge Sterry R. Waterman. Since petitioners may now appeal as a matter of right, stays are regularly granted in those circuits considering the Civil Rights Removal problem.

John E. Silverberg,

One of the Attorneys for
Appellants-Defendants

Sworn to before me this
1st day of March, 1965

ROBERT THALER
Notary Public State of New York
No. 60-9310590
Qualified in Westchester County
Commission Expires March 30, 1966

STATE OF NEW YORK)
:
COUNTY OF NEW YORK)

JOHN E. SILVERBERG, being duly sworn, deposes and says:

That he is one of the attorneys for the appellants herein and that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to those matters therein stated to be on information and belief, and as to those matters, he believes it to be true.

JOHN E. SILVERBERG

Sworn to before me this
1st day of March, 1965

ROBERT THALER
Notary Public State of New York
No. 60-9310590
Qualified in Westchester County
Commission Expires March 30, 1966

In the

Supreme Court of the United States

No. ....

HERBERT CALLENDER,
Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF
THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

CARL RACHLIN
Attorney for Appellant
Office & P.O. Address
150 Nassau Street
New York, New York 10038

R. HARCOURT DODDS,
STEPHEN M. NAGLER,
of Counsel

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IN THE

Supreme Court of the United States

No. ....

HERBERT CALLENDER,
Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF
THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant appeals from the order of the Court of Appeals of the State of New York, entered on September 29, 1966, denying appellant's motion for reargument and thereby reaffirming its judgment of July 8, 1966, affirming the conviction of appellant by the Criminal Court of the City of New York, County of New York. The conviction had previously been affirmed by the Supreme Court of the State of New York, Appellate Term, First Department. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Opinion Below

The Court of Appeals of the State of New York denied appellant's motion for reargument without opinion, 18 NY2d 751 (1966), but granted appellant's motion to amend the remittitur (Appendix, 1a, 18 NY2d 750 (1966)). The Court's previous order affirming the conviction of appellant was without opinion (18 NY2d 621, 219 NE 2nd 287 (1966); Appendix, 3a). The order of the Appellate Term of the Supreme Court of the State of New York, First Department affirming appellant's conviction, one justice dissenting, was without opinion. A memorandum opinion was filed by the dissenting justice (Appendix, 9a). The conviction of appellant in the Criminal Court of the City of New York, County of New York, was without opinion. Appellant received a sixty-day sentence as a result of the conviction herein.

Jurisdiction

This is an appeal from a conviction under Section 722 of the Penal Law of the State of New York commenced by the arrest of appellant on July 15, 1962. Appellant was convicted after trial in the Criminal Court of the City of New York, County of New York, on September 4, 1964. A motion to dismiss on the grounds that the conduct involved was protected under the First and Fourteenth Amendments and that the statute as applied to appellant was unconstitutional was denied in the Criminal Court (R. 43, 44).* These arguments were rejected by the Supreme Court of the State of New York, Appellate Term, First Department (order affirming conviction entered: January 20, 1966, R. 65), and by the Court of Appeals of the State of New York (order affirming conviction entered: July 8, 1966; order amending remittitur and denying reargument entered: September 29, 1966). The Notice of Appeal was served and filed on December 28, 1966 in the Criminal Court of the City of New York, County of New York. The jurisdiction of the Supreme Court to hear the appeal rests upon 28 U.S.C. Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to hear the appeal: *Cox* v. *State of Louisiana,* 379 U.S. 559, 85 Sup. Ct. 476 (1965); *Edwards* v. *South Carolina,* 372 U.S. 229, 83 Sup. Ct. 680 (1963); *La Crosse Tel. Corp.* v. *Wisconsin Board,* 336 U.S. 18, 69 Sup. Ct. 379 (1949); *Cantwell* v. *Connecticut,* 310 U.S. 296, 60 Sup. Ct. 900 (1940); *Thompson* v. *Louisville,* 362 U.S. 199, 80 Sup. Ct. 624 (1960).

---

* Numbers in parentheses prefixed by "R" refer to pages of the Record used in the Court of Appeals of the State of New York.

Questions Presented

The following questions are presented by this appeal:

1. Whether § 722 subd. (1) of the Penal Law of New York which provides that "Any person who *with* intent *to provoke a breach of the peace or whereby a breach of the peace may be occasioned,* . . . (Emphasis supplied)

> (1) Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior (is guilty of disorderly conduct)"

is void in violation of the due process clause of the Fourteenth Amendment as applied to a defendant who tests by legal means official conduct and against whom the evidence shows no intent to provoke a breach of the peace or whereby one may be occasioned.

2. Whether § 722 subd. (2) which provides that "Any person who with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned, . . .

> 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct or be offensive to others (is guilty of disorderly conduct)" . . .
>
> (a) is void on its face in violation of the First Amendment because it encompasses speech and conduct protected by that Amendment and prevented Appellant from making a legal test of certain official conduct.
>
> (b) is void in violation of the First and Fourteenth Amendments as applied against one who solicited the support of police officers to effectuate a "citizen's arrest" as provided by law and who was denied the right by the arresting officers to carry out a legal right of a citizen to serve a summons in order to provide a legal test of the conduct of public officials.

3. Whether § 722 subd. (3) of the Penal Law which provides that "Any person who with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned, . . .

> 3. Congregates with others on a public street and refuses to move on when ordered by the police; (is guilty of disorderly conduct)".

is void for vagueness under the "due process" clause of the Fourteenth Amendment when applied to one who is talking to police officers in order to persuade them to assist him to serve a summons as provided by the law of the State of New York in an orderly fashion in the presence of news reporters coming to observe the institution of the legal test in the corridor of a public building and where no evidence was shown of intent to provoke breach of peace or where one may be occasioned.

4. Whether § 722 of the Penal Law of New York which requires "intent to provoke a breach of the peace" or circumstances "whereby a breach of the peace may be occasioned" is void in violation of the First and Fourteenth Amendments as applied to one merely engaging in peaceful conduct with no evidence showing any danger to the peace, either by appellant or any persons present.

Statute Involved

Section 722 subsections 1, 2 and 3, of the Penal Law of the State of New York; Penal Law, Consolidated Laws, c.40, Section 722, subsections 1, 2 and 3, provide:

"Disorderly conduct.

"Any person who with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;

2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

3. Congregates with others on a public street and refuses to move on when ordered by the police."

Statement

Appellant was convicted and sentenced to 60 days in the workhouse on a charge of violation of Section 722 of the Penal Law. Detective Sergeant Dennis Burke and Lieutenant John W. Delehanty testified that on the morning of July 15, 1966 they were on duty at the Police Gate at City Hall, Manhattan. This gate is located inside the City Hall building approximately twelve feet from the main entrance in a corridor eight feet wide (R. 10, 11). At approximately 10:50 a.m., appellant and two other people appeared at the gate. As he arrived, appellant told Sergeant Burke that he had come to City Hall to test the allocation of funds by the Mayor which supported a pattern of discrimination in the Building Trades by effecting the arrest of the Mayor of the City of New York on charges of violating Sections 1838 and 1865 of the Penal Law. In response to this request by appellant to Sergeant Burke for cooperation in this effort, which could have been carried out very simply, appellant was informed by Burke that in the opinion of the New York City Corporation Counsel and the Legal Bureau of the Police Department such an arrest would be illegal; on that basis the Sergeant refused Callender any assistance (R. 12, 13, 24). A similar request directed by appellant to Lt. Delehanty was equally unsuccessful (R. 25).

Appellant was then informed by Sgt. Burke that by his unspecified actions he was causing a crowd to collect. In fact, the crowd of reporters was there before he arrived. No evidence exists that any serious enlargement of the

crowd resulted from any act of the appellant. Appellant was asked to leave the premises but did not do so, stating that he intended to seek further police assistance in effecting the arrest of the Mayor. There were approximately thirty to fifty persons in the corridor area consisting of police officers, newspaper reporters and cameramen, the appellant and two companions. Appellant made a statement which was transcribed by one of the reporters carrying a tape recorder (R. 13, 14, 25, 30). When asked to leave under pain of arrest, appellant never refusing to go, merely reiterated his request for police assistance. At this juncture he was taken into custody by Sgt. Burke (R. 11, 26). The area in which all of these events transpired is one commonly crowded with members of the press and the public and frequently used by city officials for impromptu press conferences. Both police witnesses testified on cross examination that no one had complained to them about being denied entrance or exit through the police gate to or from the inner offices of the Mayor (R. 20, 23, 28). Despite the supposed crowd, Lt. Delehanty testified that several people who had come to City Hall to witness the signing of certain legislation could be and were escorted to an upstairs room to await the Mayor's arrival. This was normal procedure as the Mayor's Reception Room was then otherwise occupied. This group of people did not have to pass through the gate and appellant was not heard to say anything abusive or offensive to them or, for that matter, to anyone else (R. 28, 29). No witnesses were called to testify by the prosecution for the purpose of showing that they could not pass through the corridor.

When he approached the police gate, appellant said that he explained to Sgt. Burke that he had come to make a citizen's arrest of the Mayor in order to initiate a court action to test the validity of certain appropriations for public construction which were being paid to contractors and ultimately to unions who discriminated against Negroes and Puerto Ricans. Upon being informed by Sgt. Burke and Lt. Delehanty that they would not assist him in carrying out his protest against the City's discriminatory practices, appellant indicated that he wished to wait until he could secure the assistance of a willing officer. At no time was his conduct disorderly nor did the police state so. His arrest followed almost immediately thereafter without any intervening event (R. 33, 34). Mr. Callender testified that he had been advised by counsel that a citizen's arrest would be proper to make such a legal test (R. 37, 38).

How the Federal Question Is Presented.

At the trial in the Criminal Court, counsel for appellant moved to dismiss the charge on the ground that no evidence had been adduced to sustain a conviction under any of the subsections of Section 722 of the Penal Law with which appellant was charged (R. 37). Counsel further argued that appellant's action, being in the nature of a petition to seek redress from official wrong, fell within the ambit of the First and Fourteenth Amendments and, therefore, each subsection of Section 722 under which appellant was charged constituted, as applied, an unconstitutional abridgement of the freedom of speech (R. 38). Without specifically so finding, these arguments were rejected by a general finding of guilt. Nor did the trial court specify the subsection under which appellant was convicted.

The intermediate appellate court, the Appellate Term of the Supreme Court of the State of New York, First Department, also *sub silentio,* rejected arguments based on the theories of protected conduct and the unconstitutionality of Section 722 of the Penal Law as applied; Mr. Justice Hofstadter, dissenting however, agreed with appellant, based on dissenting opinions in *People* v. *Penn* (16 N.Y.2d 872 (1965)) and *People* v. *Turner* (17 N.Y.2d 829 (1966)).

In amending the remittitur, the N.Y. Court of Appeals indicated its consideration of these contentions, but also filed no opinion either at that time or when it originally considered the case. Thus as of this moment except for the dissent of Mr. Justice Hofstadter, no opinion has been filed in any court below, although the issues are substantial.

THE QUESTIONS ARE SUBSTANTIAL

I

As interpreted by the courts below Section 722 is unconstitutional, both on its face and as applied to appellant in violation of the First Amendment and because it is unconstitutionally vague in violation of the due process clause of the Fourteenth Amendment.

By all accounts of the "conduct" of appellant he engaged only in pure speech to solicit the assistance of police officers to assist him to make an arrest. His speech conveyed no threat and was in no way provocative. Compare *Cantwell* v. *Connecticut,* 310 U.S. 296, 60 Supreme Court 900 (1940). His desire to effect the arrest of the Mayor was, as expressed in advance, to test the right of the City of New York to continue discriminatory conduct against racial minorities by unions in the construction trades assisted with ublic funds. The policemen on duty testified that they nderstood his action to be in accord with his objective.

This case involves an exercise of pure speech, an act of etition for redress of official wrong in a public setting hich the New York courts have deemed violative of Section 722. Similar to this case we urge is *Cantwell* v. *Connecticut,* 310 U.S. 296, 60 Sup. Ct. 900 (1940) where this ourt ruled that the common law standard of breach of the eace had not been met by pure speech in a public setting.

The fact that a number of reporters had gathered prior o appellant's arrival does not dictate any different conlusion. There has been absolutely no showing that this esult caused or would occasion a breach of the peace. In act, the presence of newspapermen, cameramen and police fficers in a locale where newsgathering was customary ould seem to indicate no likelihood of a possible breach f the peace. See *Edwards* v. *South Carolina,* 372 U.S. 229, 3 Sup. Ct. 680 (1963).

If the police in good faith had been concerned with the lleged traffic situation, they could have easily ordered a light narrowing of the gathering.

No such action was taken in this case with the result hat the exercise of free speech was unconstitutionally infringed. *Cox* v. *Louisiana,* 379 U.S. 536, 85 Sup. Ct. 476 (1965); *Edwards* v. *South Carolina, supra.*

The fundamental right to express an opinion on a curent matter of national concern, to petition one's governent, to make a legal test is of such importance that we rge it warrants this Court's consideration on appeal.

As stated above, the evidence below in no way establishes a breach of the peace within the meaning of Section 722. For a breach of the peace to be sustained, there must be a showing that there has been a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm disturbs the peace and quiet of the community. *People* v. *Most,* 171 N.Y. 423 (1902); *Cantwell* v. *Connecticut,* 310 U.S. 296, 60 Sup. Ct. 900 (1940). In his attempt to register his protest, appellant displayed no intent whatsoever to provoke a breach of the peace nor can such an intent be inferred from the surrounding circumstances. As there was no evidence from which an intent to provoke a breach of the peace might be inferred and no evidence of conditions under which a breach of the peace might have been occasioned, the record herein is "so totally devoid of evidentiary support as to render (the) . . . conviction unconstitutional under the due process clause of the Fourteenth Amendment". *Thompson* v. *Louisville,* 362 U.S. 199, 80 Sup. Ct. 624 (1960). See also *Barr* v. *Columbia,* 378 U.S. 146, 84 Sup. Ct. 1734 (1964) and *Garner* v. *Louisiana,* 368 U.S. 157, 82 Sup. Ct. 248 (1961).

With respect to subsection 1 of Section 722, no evidence was introduced to support a charge that appellant used offensive, disorderly, threatening, abusive or insulting language, conduct or behavior. Inasmuch as the trial court's general verdict of guilty necessarily included a finding that this subsection had been violated, this aspect of the conviction was in violation of the due process requirement of the Fourteenth Amendment. *Thompson* v. *Louisville, supra.*

II

**No breach of the peace being shown, nor such con-
ıct whereby one may be occasioned, the arrests vio-
ted the First and Fourteenth Amendments.**

Not having committed a wrongful act and being in a
cation where he has a right to be, at a time when his
resence is legally proper, an arrest of such citizen for
ilure to move on when ordered, violates the United States
onstitution as interpreted by this court in *Edwards* v.
outh Carolina, supra and *Cox* v. *Louisiana, supra* since
ıch arrest is not pursuant to a narrowly drawn, clearly
nderstood statute.

While it may be true that these police officers were ad-
ised that the contemplated test by arrest was illegal (the
ccuracy of such advice is seriously open to question), that
no way gives them the right to demand that Callender
ave or be arrested. If Callender's test was improper,
n appropriate Court would have so advised him, and that
ould have ended the matter.

Such conduct as that of the officers, upheld by the New
ork courts, when a man is trying to use the peaceful
rocesses of the law, is what drives persons onto the
treets and into public disorder.

Making such conduct, as that of appellant illegal under
ection 722 places an unconstitutional interpretation upon
ıat statute and, we urge, requires reversal of the convic-
ion. See *Terminiello* v. *Chicago,* 337 U.S. 1, 69 Sup. Ct. 894
1949).

CONCLUSION

It is submitted that the decision of the Court of Appeals of the State of New York renders Section 722 of the New York Penal Law violative of the First and Fourteenth Amendments both on its face and as applied. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

Carl Rachlin
Attorney for Appellant
Herbert Callender

R. Harcourt Dodds,
Stephen M. Nagler,
of Counsel

APPENDIX

APPENDIX

Order Appealed From (Denying Reargument)

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-ninth day of September A. D. 1966.

Present,

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No. 927

THE PEOPLE &c.,
Respondent,

vs.

HERBERT CALLENDER,
Appellant.

A motion for reargument and to amend the remittitur in the above cause to this Court having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

Ordered, that the said motion, insofar as it seeks amendment of the remittitur, be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Appellant contended that his conduct, which formed the basis of his conviction, was protected under the First and Fourteenth Amendments and, further, that Section 722 of the Penal Law of the State of New York as applied to him was unconstitutional. The Court of Appeals held that appellant's constitutional rights under the First and Fourteenth Amendments had not been violated, and that as applied to him Section 722 of the Penal Law was constitutional.

And the Criminal Court of the City of New York hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Gearon Kimball
Deputy Clerk

COURT OF APPEALS

No. 221

Remittitur

State of New York, *ss.*:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

Witness,

The Hon. Charles Desmond,
Chief Judge, Presiding.

Raymond J. Cannon, *Clerk.*

Remittitur July 7, 1966.

App T. 1. No. 221.

The People &c.,
Respondent,

vs.

Herbert Callender,
Appellant.

Be It Remembered, That on the 7th day of May in the year of our Lord one thousand nine hundred and sixty-six, Herbert Callender, the appellant in this cause, came here unto the Court of Appeals, by William S. Ellis, and Carl Rachlin, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the

Appellate Term of the Supreme Court, First Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. William S. Ellis, of counsel for the appellant, and by Mr. Frederick P. Hafetz, of counsel for the respondent, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the judgment herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Criminal Court of the City of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Criminal Court of the City of New York, before the Judges thereof, according to the form of the statute in such case made and provided to be enforced according to law, and which record now remains in the said Criminal Court, before the Judges thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, July 7, 1966.

(Seal)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

Order of Appellate Term

At an Appellate Term of the Supreme Court,
First Department, held on the County Court
House, Borough of Manhattan, City of New
York, on the 20th day of January, 1966.

Present:

Hon. Samuel M. Gold, *J.P.*,
" Louis J. Capozzoli,
" Samuel H. Hofstadter, (dissenting)
Justices.

Nov. #422

The People of the State of New York,
Respondent,
vs.
Herbert Callender,
Defendant-Appellant.

An appeal having been taken to this court by defendant from a judgment of conviction of the Criminal Court of the City of New York, County of New York, after trial before Hon. Mitchell J. Sherwin, on the 25th day of November, 1964, upon the charge of violating §722, subds. 1, 2, and 3 of the Penal Law, and having been sentenced by Hon. Louis A. Cioffi on the 13th day of January, 1965, as follows:

60 days in the Workhouse

and the said appeal having been heard and due deliberation having been had thereon,

It Is Ordered and Adjudged that the said judgment so appealed from be and the same is hereby affirmed.

Enter

S M G
Justice Appellate Term
Supreme Court, First Department.

Appellate Term Decision

APPELLATE TERM OF THE SUPREME COURT,
FIRST DEPARTMENT, NOVEMBER, 1965

Present:

HON. SAMUEL M. GOLD, *J.P.*,
" LOUIS J. CAPOZZOLI,
" SAMUEL H. HOFSTADTER,
Justices.

No. 422

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

HERBERT CALLENDER,
Defendant-Appellant.

Appeal by defendant from a judgment of conviction of the Criminal Court of the City of New York, County of New York, after trial, of violating section 722, subdivisions 1, 2 and 3 of the Penal Law [disorderly conduct].

PER CURIAM:

Judgment of conviction affirmed.

I concur, S M G

I concur, L J C

I dissent and order to reverse the conviction and to dismiss the Complaint (S H H)

Dissenting Memorandum

PEOPLE v. CALLENDER

November No. 422

HOFSTADTER, *J.*:

For the reasons stated in my dissenting opinion in People v. Penn et al., February, 1964, #45, 152 N.Y.L.J. 76, October 16, 1964, p. 16, affd. 16 N.Y. 581, motion to amend remittitur granted September 27, 1965, and in my dissenting memorandum in People v. Turner et al., May 1965, #145, 154 N.Y.L.J. 93, November 15, 1965, p. 16, my view is that defendant's acts were constitutionally protected and did not constitute disorderly conduct within the purview of Penal Law, Section 722 constitutionally delimited. I therefore dissent and vote to reverse the conviction on the law and on the facts and to dismiss the complaint.

12/22/65

SAMUEL H. HOFSTADTER

IN THE

Supreme Court of the United States

October Term, 1966

No. ....

HERBERT CALLENDER,
Defendant-Appellant,
against
THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

Reply to

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1966

No. ....

Herbert Callender,
Defendant-Appellant,
against

The People of the State of New York,
Appellee.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellee respectfully moves to dismiss the appeal in the above-entitled case on the ground that it does not present a substantial federal question, or to affirm.

The Statute Involved

The relevant portions of Sections 722 of the Penal Law provide:

> "Disorderly Conduct.
>
> "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may

be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

"1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;

"2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

"3. Congregates with others on a public street and refuses to move on when ordered by the police;"

THE EVIDENCE

The People's Case

Sergeant **Dennis Burke** testified that on July 15, 1964, e was on duty at a police gate in a corridor of City Hall eading to the Mayor's Office (4-5).* The corridor, from ts beginning point to the gate, was eight feet wide and welve feet long; the gate itself was three feet wide (5, 3). Beyond the gate were, in addition to the Mayor's ffice, the offices of the Executive Secretary to the Mayor, he Legal Assistant to the Mayor, the Secretary of the eputy Mayor, the Deputy Mayor, several other assistnts, and the clerical staff (5). Aside from officials, mesengers and clerical help who were permitted to "come ight through" the gate, the standard police practice was o admit only persons who had an appointment with somene inside (16).

At about 10:50 that morning, the defendant, accomanied by several other persons, approached Sergeant

Burke at the gate (6-7). Defendant stated that he had come to make a citizen's arrest of the Mayor and that he wanted Sergeant Burke to assist him (7). The sergeant informed defendant that he would not assist him because he had been advised by the Corporation Counsel and the Legal Bureau of the Police Department that such arrest would be illegal (7). At this point there were about thirty persons in the corridor, standing "four or five across and about six deep," and entry through the gate was possible only by "pushing people aside" (10, 16). The crowd included persons who were waiting to see the Mayor in connection with his scheduled "announcement concerning a gift to Mt. Morris Park," and some newsmen and cameramen (8, 13). After Burke's refusal of assistance, defendant asked him for his identification. The officer showed his badge to defendant and then requested him to leave, telling him "that he was causing a crowd to collect and interfering with the normal business of City Hall by preventing normal exits through the gate" (7-8, 10).

Ignoring Burke's request, defendant began speaking to newsmen, and then approached another officer, Lieutenant Delehanty, requesting his assistance in arresting the Mayor (10). Observing that the crowd had grown larger, Burke approached defendant and again told him to leave because "He obstructed the entrance to the hall and interfered with the Mayor's business" (11). Defendant replied that "he would remain there until he would make the arrest of the Mayor" (11). Burke informed Callender that if he refused to move on, he would be arrested (11). Defendant again refused to move and was then placed under arrest (11).

---

* References, unless otherwise indicated, are to the typewritten minutes of trial.

Lieutenant **John W. Delehanty** testified that at about
):50 a.m. on the morning in question, the defendant and
vo others arrived at City Hall and approached the gate
ading to the Mayor's Office (18-19). In the eight by
velve foot corridor leading to the gate was a small crowd
aiting to be escorted through the gate "for the Mayor's
cheduled calendar of a gift for Mr. Rogers from Mt.
Iorris Park" (*sic*) (20). In a waiting room inside the
ate was another group waiting to attend the Mayor's
cheduled signing of a minimum wage law (20, 23). The
Iayor's schedule that morning also included the signing
f some other local laws (20).

Addressing Sergeant Burke at the police desk behind
ne gate, the defendant stated that he wanted to make a
tizen's arrest of the Mayor and wished Burke to assist
im (19). Refusing to assist, Burke told defendant that
ccording to the opinion of the Corporation Counsel, such
rrest would be illegal (19). Defendant repeated his re-
uest and Burke again refused (19). Turning then to
ieutenant Delehanty, defendant twice made the same re-
uest and Delehanty twice gave the same answer as Burke
ad given (19). At this time a crowd of about forty or
fty persons had collected in the corridor; there was no
ccess to the gate because "It was impossible to get
rough the crowd that was gathered around" (21, 24).
ergeant Burke then "asked Mr. Callender to leave * * *
ecause he was causing a crowd to collect and interfering
ith the normal business of City Hall" (19). Defendant
fused whereupon Lieutenant Delehanty reiterated the
quest (19). When defendant again refused, Burke placed
m under arrest (19-20).

The Defense

Herbert Callender, the defendant, previously convicted of unlawful intrusion, testified that he was a field secretary for the Congress of Racial Equality (25, 36). At about 10 a.m. on the day in question, together with two other CORE workers, he arrived at City Hall and approached a gate leading to the Mayor's Office (26, 30). Standing directly in front of the gate, Callender announced to Sergeant Burke that he had come:

> "to effect a citizen's arrest of Mayor Wagner, charging him with misappropriation of public funds, that the funds were being used for public protection supplying contractors and discriminated against Negroes and Puerto Ricans, that to focus this law, this is one of the means that we wanted to bring before the court" (26-7).

In the corridor leading to the gate were many people, including "a number of pressmen" (30). Callender had previously issued a press release announcing his intended arrest of the Mayor at City Hall (30).

Replying to defendant, Burke declined to assist because he had been advised that such an arrest would be illegal (27). Defendant moved to the side of the gate and continued his conversation with Burke (27). As they spoke, newsmen thrust a radio microphone between them (27). Unsuccessful with Sergeant Burke, defendant then walked over to Lieutenant Delehanty and reiterated his request (28). Delehanty also refused to assist (28). A few minutes later, as defendant stood "up against the wall,'' Burke approached him and asked whether he was going to leave (28). Defendant explained to Burke:

> ''I am not here to engage myself in any civil disobedience * * * but I am here to make a citizen's arrest and I believe that is my right, and that I was willing to wait until that arrest could be effected when some police officer could assist me with it. I was willing to try to find at least one'' (28).

Admonished that he would be arrested if he did not leave, defendant again requested Burke to assist him whereupon the officer placed him under arrest (28).

ARGUMENT

No Substantial Federal Questions Are Presented

On a busy morning at City Hall, defendant, flanked by two confederates and followed by numerous reporters and television cameramen, walked to the police gate in the narrow corridor leading to the Mayor's Office and announced to the officers there that he wanted their assistance in making a citizen's arrest of the Mayor. Declining to assist, the officers explained that they had been advised by the Corporation Counsel that such arrest would be unlawful. Defendant, however, continued to request their assistance. Finally, the officers informed defendant ''that he was causing a crowd to collect and interfering with the normal business of City Hall by preventing normal [access] through the gate,'' and they requested him to move on (8). The small, eight by twelve foot corridor leading to the gate, previously uncrowded, had, upon defendant's arrival, suddenly become jammed by a crowd of over thirty persons, standing ''four or five across'' (16), and ''[i]t was impossible to get through the crowd'' (21) without ''pushing people aside'' (10).

Brazenly ignoring the police requests, defendant turned to a group of reporters and began speaking to them. The officers, knowing that the Mayor had a busy schedule that morning again requested that defendant leave. Persisting there, defendant replied that ''he would remain * * * until he would make the arrest of the Mayor'' (11). At this time defendant was placed under arrest.

Unquestionably, defendant's acts, causing total obstruction of a public entrance to a vital wing of City Hall, constituted disorderly conduct under New York Penal Law Section 722, Subdivision 2. That provision, as construed by the New York Courts, proscribes conduct causing ''serious annoyance'' to others [*People* v. *Carcel,* 3 N. Y. 2d 327, 331 (1957); see *People* v. *Perry,* 265 N. Y. 362 (1932); *People* v. *Most,* 171 N. Y. 423 (1902)]. In contrast to the ''generalized'' breach of the peace statutes condemned by this Court in *Edwards* v. *South Carolina,* 372 U. S. 229, 237 (1963) and *Cox* v. *Louisiana,* 379 U. S. 536 (1965) [cited by appellant, brief, pp. 10, 12], Subdivision 2, as construed, has been ''limited to define and punish specific conduct lying within the domain of State power'' [*Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 573 (1942)]. Illustrating the narrow compass of Subdivision 2 is the New York Court of Appeals' reversal of two leaflet distributors' conviction under this provision because the evidence showed ''only * * * that the defendants were blocking the pedestrian's right of way'' [*People* v. *Carcel, supra,* at 332].

Additionally, the evidence amply supports defendant's
onviction under Subdivision 3 of the statute. As con-
trued by the New York Courts, this law punishes only
he refusal to obey a reasonable order [*People* v. *Galpern,*
59 N. Y. 279 (1932); *People* v. *Nixon,* 248 N. Y. 182 (1928);
ee *People* v. *Penn, et al.,* 48 Misc. 2d 634 (Appellate Term,
irst Dept. 1964), aff'd 16 N. Y. 2d 581 (1965), *cert. denied*
83 U. S. 969 (1966).] The criteria of reasonableness are
he necessities of the situation. Thus, in *People* v. *Feiner,*
00 N. Y. 391 (1950), the New York Court of Appeals,
eeming lawful a police order to move on, relied upon evi-
ence that defendant attracted a crowd which "filled the
idewalk and spilled out into the adjacent thoroughfare, ob-
tructing or impeding both pedestrian and vehicular traf-
c" [*id.* at 400].

In *Feiner* v. *New York,* 340 U. S. 315 (1951), this Court
pheld the constitutionality of Subdivision 3. And, re-
ently, in *Shuttlesworth* v. *Birmingham,* 382 U. S. 87 (1965),
his Court, in dicta, deemed constitutional a Birmingham
rdinance which, as construed by Alabama courts, pun-
shed failure to obey a police order to move on based on
he accused's "blocking free passage" [*id.* at 91].

Seeking to justify his disruptive conduct, defendant
ontends that his attempt to arrest the Mayor was a form
f expressing a political cause—the Mayor's alleged
rongful appropriation of public funds through building
ontracts with unions practicing racial discrimination—
nd, therefore, was protected by the First Amendment.
 is true that certain forms of nonverbal expression have
een accorded First Amendment protection, such as "pa-

trolling, marching, and picketing" [*Cox* v. *Louisiana,* 379 U. S. 536, 555 (1965)], exhibition of a flag [*Stromberg* v. *California,* 283 U. S. 259 (1931)], and even hanging a clothesline filled with dirty clothes on a front lawn [*People* v. *Stover,* 12 N. Y. 2d 462 (1963)]. However, the conduct here—an attempted physical seizure of another person—is so obviously beyond the pale of the most far reaching constitutional embrace of nonverbal expression that it merits no protection. Presumably, by defendant's reasoning, a physical attack on the Mayor intended as a petition for the redress of grievance would fall within the ambit of the First Amendment. Defendant's argument wholly distorts the nature of the right bestowed in the First Amendment.

Moreover, defendant's argument incorrectly assumes that the act in question here is his attempt to arrest the Mayor. Examination of the record, however, clearly reveals that the thrust of the case against defendant was his continued, disruptive presence in City Hall after his attempt to arrest the Mayor had failed by virtue of the police officer's adamant refusals to assist him in effecting a citizen's arrest.

Even assuming, however, that defendant's conduct was a form of First Amendment activity, its restriction was proper. This Court has consistently held that communication of ideas in public places is subject to reasonable regulation [*Cox* v. *Louisiana,* 379 U. S. 550 (1965); *Poulos* v. *New Hampshire,* 345 U. S. 397 (1953); *Feiner* v. *New York,* 340 U. S. 315 (1951); *Martin* v. *Struthers,* 319 U. S. 141 (1943); *Cox* v. *New Hampshire,* 312 U. S. 569 (1940);

chneider v. *State,* 308 U. S. 147 (1939)]. And, it is qually clear that where communication is by conduct, the 'irst and Fourteenth Amendments do not "afford the ame kind of freedom * * * as these amendments afford to hose who communicate ideas by pure speech" [*Cox* v. *ouisiana, supra,* at 555; *Giboney* v. *Empire Storage and ce Co.,* 336 U. S. 490 (1949)]. In the instant case, the disuption caused by defendant's First Amendment activity nquestionably rendered the application of Section 722 a easonable regulation [*Feiner* v. *New York,* 340 U. S. 315 1951)]; particularly since the First Amendment activity, indeed it was that, was in the lesser protected form of onduct, not "pure speech" [*Cox* v. *Louisiana, supra.* at 55; see *People* v. *Penn et al.,* 16 N. Y. 2d 581 (1965), *cert. en.* 383 U. S. 969 (1966)].

Furthermore, any substantiality to the issue of the pplication of Section 722, Subdivisions 2 and 3 to defendnt's alleged First Amendment activity is diminished by irtue of this Court's recent grant of certiorari in *Turner t al.* v. *New York* (No. 399, to be argued on April 12, 1967). 'he claims made by the instant defendant are virtually lentical to those raised by petitioners in *Turner.*

Misguided is defendant's reliance on *Cox* v. *Louisiana, upra.* There, reversing convictions under a *Louisiana* reach of the peace similar to Section 722, this Court held he application of the statute unconstitutional because it llowed "persons to be punished merely for peacefully exressing unpopular views" [*id.* at 551]. In contrast, the tatute here was directed not at defendant's expression of npopular views, but at his obstructive behavior and failre to obey reasonable police commands. Indeed, as noted

above, the *Cox* opinion cogently reaffirmed the validity of reasonable State regulation of disruptive First Amendment activity such as defendant's in the present case.

> "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy * * * A group of demonstrators could not insist upon the right to cordon off a street or entrance to a public or private building * * *" [*id.* at 554].

Conclusion

We respectfully submit, therefore, that the appeal should be dismissed because no substantial federal question has been presented; in the alternative, the judgment below should be summarily affirmed as eminently sound and fully consistent with pertinent constitutional principles.

Respectfully submitted,

Frank S. Hogan
District Attorney
New York County

H. Richard Uviller
Frederick P. Hafetz
Assistant District Attorneys
Of Counsel

April, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

CALLENDER *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 1103. Decided May 8, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

Rule

Supreme Court of the United States

No. **1103** ----, *October Term, 19***66**

HERBERT CALLENDER,

Appellant,

vs.

NEW YORK

ORDER

UPON CONSIDERATION of the application of counsel for the appellee and of the consent of counsel for the appellant thereto,

IT IS ORDERED that the time for filing a motion under Rule 16 be, and the same is hereby, extended to and including April 6th, 1967.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States.

Dated this 27th

day of March, 1967.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

March 1, 1967

Carl Rachlin, Esq.
150 Nassau Street
New York, N. Y. 10038

RE: CALLENDER v. NEW YORK
No. 1103, October Term, 1966

Dear Mr. Rachlin:

I received your letter of February 24, together with the documents referred to therein, in connection with the above-captioned appeal. This case was docketed February 27, 1967, as No. 1103, October Term, 1966.

Kindly complete both sides of the enclosed form for the entry of your appearance and return it to this office.

Very truly yours,

JOHN F. DAVIS, Clerk

By Jennie H. Lazowski

(Miss) Jennie H. Lazowski
Assistant

jmh
Enclosure

File

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

Mr. Hafetz

NEY'S OFFICE
COUNTY
1967 ... 29 AM 9 40

March 28, 1967

Frederick P. Hafetz, Esquire
Assistant District Attorney
155 Leonard Street
New York 13, New York

RE: HERBERT CALLENDER v. NEW YORK
No. 1103, October Term, 1966

Dear Mr. Hafetz:

Your application for an extension of time in which to file a motion under Rule 16 in the above-entitled case was presented to Mr. Justice Harlan, who on March 27th signed an order extending your time to and including April 6, 1967.

A copy of the Justice's order is enclosed and you should advise your adversary of its entry.

Very truly yours,

JOHN F. DAVIS, Clerk

By Edward C. Schade

E. C. Schade
Assistant

ECS:mk
Enclosure

April 6, 1967

R. Harcourt Dodds, Esq.
c/o Charles Phfizer and Company
235 East 42nd Street
New York, New York

Dear Harry:

Enclosed is the "Motion to Dismiss or Affirm" served on us today. We have 20 days to file a reply.

I will try to work on this over the weekend. Thanks again for your previous assistance, Harry, as well as your coming efforts. Herb Callender also thanks you from the bottom of his great big heart.

Sincerely,

Stephen M. Nagler

SN:n

April 7, 1967

Robert Saginaw, Esq.
130 West 42nd Street
New York, New York

Dear Bob:

Enclosed is the sample motion to resentence which I promised you. Feel free to make whatever improvement you deem necessary. Unlike Sprowal, the issue of length of sentence was not raised before the Appellate Term in Callender.

Did you find out whether a denial of the motion is appeallable? If you have any questions please let me know.

Sincerely,

Stephen M. Nagler

SMN:n

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

May 8, 1967

RE: CALLENDER v. NEW YORK,
No. 1103, Oct. Term, 1966

Dear Sir:

Enclosed is a copy of the opinion *per curiam* entered by the Court today in the above-entitled case.

Very truly yours,

JOHN F. DAVIS, Clerk
By C.T. Lyddane
Assistant

Enclosure

Carl Rachlin, Esq.
150 Nassau St.
New York, N.Y. 10038

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

June 2, 1967

Carl Rachlin, Esquire
150 Nassau Street
New York, New York 10038

RE: Callender v. N. Y., No.
1103, Oct. Term, 1966

Dear Mr. Rachlin:

A certified copy of the judgment of this Court in the above-entitled case has been mailed today to the Clerk of the Courtof Appeals of New York.

Very truly yours,

JOHN F. DAVIS, Clerk

By Evelyn R. Limstrong

(Mrs.) Evelyn R. Limstrong
Assistant

August 16,1967

Mr. Steve Naghen
c/o S.E.D.A. 10th Floor
150 Nassau Street
New York, New York

Dear Sir:

It is now more than two (2) years since I was sentenced to sixty (60) days in the workhouse for attempting to arrest Mayor Wagner. In that time, I have had the opportunity to consider and re-evaluate my conduct on that occassion, in light of my more recent activities.

I was and am deeply concerned with the many problems confronting the poor in the City of New York and elsewhere. On the day that I entered City Hall to arrest the Mayor, I was particulary concerned with Employment Discrimination in the Building Trades Industry. I had been advised by a lawyer that my cause was legal, and I am sorry I violated the law.

I am also sorry for any inconvenience caused to Mayor Wagner. As evidence of my contrition, I would like to draw your attention to the fact that I have not been arrest since my trial, and to my activities since that time.

I am as deeply concerned with the problems of the poor as ever. As Training Consultant to M.E.N.D. (Massive Economic Neighborhood Development) located at 200 East 116th Street, in East Harlem, I have an opportunity to contribute to the development of skills leading to Self Improvement. I feel that I am now in a position to function at optimum level to relieve the many burdens of these people.

I believe as firmly as ever in the moral wrong of discrimination but I also believe that there are methods more effective that those I chose for breaking down discrimination in the Construction Industry.

I sincerely hope that you will consider my present activities and my apologies in passing only application for sentence reconsideration.

Respectfully,

HC:el

Mr. Herbert Callender

Mrs. Herb Callender — 862 8487

mrs Callender
last January took Duplex
115 08 145th st   upstairs apt
Jamaica, Queens   2 yr lease
Dec 31, 1969 expired.

Agent - Lizzie Jennings } # 322 7314
John Isaac } RO2 9092
They lived downstairs together
Same address
Repair business

Antoinette Better

Muriel Tillinghast
↓
mrs

Said sac ~~was~~ married
(h) in Vietnam

They kept 2 ~~dogs~~ cats and a dog
got rid of dog

cut-off heat + hot water
M.T. went to RRA

3 weeks notice

landlady said ok
" she would buy blinds

$160	deposit
$ 60	blinds
$ 220	

dln hole

plumbing problem to put out
5" hole into downstairs
heating problem (fixed)
latch on door flimsy + spring bad

SCHOOL BOARD OF WEST FELICIANA PARISH (LA.) et al,
1965-1966 (SCHOOL DESEGREGATION CASE)

Box 35
Folder 6

State Historical Society of Wisconsin

Please Retain Original Order

THE FOLLOWING PAGES ARE THE BEST
AVAILABLE.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

ROBERT CARTER, MARY CARTER, MARTHA CARTER, BARBARA JEAN CARTER, AND [illegible] CARTER, MINORS, BY THEIR FATHER AND NEXT FRIEND, [illegible] CARTER;

[illegible] GRAY, J. M. GRAY, AND VALERIE [illegible] GRAY, MINORS, BY THEIR FATHER AND NEXT FRIEND [illegible] GRAY;

JOSEPH TAYLOR, JR., AND GEORGE [illegible]

PLAINTIFFS

VS.

SCHOOL BOARD OF WEST FELICIANA PARISH, A CORPORATION; JEROME A. [illegible], SUPERINTENDENT OF SCHOOLS OF WEST FELICIANA AND THOMAS E. [illegible], PRESIDENT OF WEST FELICIANA PARISH SCHOOL BOARD

CIVIL ACTION

NUMBER [illegible]

A N S W E R

Now into Court, through undersigned Counsel come the West Feliciana Parish School Board, a public body corporate of the State of Louisiana, Thomas E. [illegible], President, and Jerome A. [illegible], Superintendent of the Public Schools of West Feliciana Parish, State of Louisiana, made defendants in the above captioned [illegible] and for answer to plaintiff's complaint do hereby answer and respectfully [illegible]

1.

The allegations of Article 1 of the complaint are denied.

2.

The allegations of Article 2 of the complaint are admitted.

3.

The allegations of Article 3 of the complaint are denied.

4.

The allegations of Article 4 of the complaint are admitted.

5.

The allegations of Article 5 of the complaint are admitted.

6.

The allegations of Article 6 are admitted except respondents deny [illegible] any particular number of the negro race and especially deny that is [illegible] or has discriminated against Negroes [illegible] in their formulation of budgets and disbursements of school funds.

7.

Respondents admit that Attorney Murphy W. Bell sent a letter to the [illegible] Feliciana Parish School Board on or about June 28th, 1965 accompanied by a petition making certain demands on your defendants.

8.

The allegations of Article 8 of the complaint are denied.

9.

The allegations of Article 9 of the complaint are denied.

WHEREFORE, the premises considered, your defendants respectfully pray that this answer be deemed good and sufficient and that plaintiffs' demands be [illegible] at their costs.

Alternatively, and only in the alternative should this Court hold that a bi-racial school system is inherently discriminatory, then defendants pray that this Court assume jurisdiction to supervise the development and implementation of an orderly plan of desegregation of the public schools of West Feliciana Parish, Louisiana, in such manner as to assure an orderly transition from a bi racial to a unitary, [illegible] system.

Further in the alternative, and again only if this Court should hold that a bi-racial school system is inherently discriminatory and that an orderly plan of desegregation should be adopted, defendants respectfully request a reasonable period of time within which to formulate and submit such an orderly plan on their own.

JACK P. F. GREMILLION, ATTORNEY GENERAL
OF LOUISIANA, STATE CAPITOL, BATON ROUGE,
LOUISIANA;

HARRY J. KRON, JR., ASSISTANT ATTORNEY
GENERAL, STATE CAPITOL, BATON ROUGE,
LOUISIANA

S/ Richard H. Kilbourne
RICHARD H. KILBOURNE
DISTRICT ATTORNEY, TWENTIETH JUDICIAL
DISTRICT COURT, CLINTON, LOUISIANA

ATTORNEYS FOR WEST FELICIANA PARISH SCHOOL
BOARD;
[illegible] L. [illegible], PRESIDENT, and
[illegible] A. [illegible], SUPERINTENDENT OF THE
PUBLIC SCHOOLS OF WEST FELICIANA PARISH,
LOUISIANA.

[illegible]

[illegible]

[illegible]

/s/ Richard W. [illegible]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 22855

U. S. COURT OF APPEALS
FILED
AUG 18 1965
EDWARD W. WADSWORTH
CLERK

ROBERT CARTER, ET AL.,

Appellants,

versus

SCHOOL BOARD OF WEST FELICIANA PARISH, ET AL.,

Appellees.

MOTION FOR FURTHER INJUNCTIVE RELIEF PENDING APPEAL

Before RIVES, JONES and GEWIN, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the judgment of the district court be and it is hereby vacated and the cause is remanded to the district court for further consideration in the light of Singleton v. Jackson Municipal Separate School District, et al., ______Fed. 2d ____, No. 22527, decided by this Court on June 22, 1965, and Price v. Denison Independent School District Board of Education, et al., _____Fed. 2d ____, No. 21632, decided by this Court on July 2, 1965.

West Feliciana

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

ROBERT CARTER, ET AL

VS

SCHOOL BOARD OF WEST FELICIANA
PARISH, ET AL

CIVIL ACTION NO.
3248
(Baton Rouge Div.)

U. S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
FILED SEP 1 1965
A. DALLAM O'BRIEN, JR.
CLERK

This court has been handed the record in the captioned case which was originally assigned to the Baton Rouge Division of this court.

This suit was originally filed July 22, 1965, and in due course the Honorable E. Gordon West entered an order wherein desegregation of the West Feliciana Schools under the guidelines enunciated by the Fifth Circuit Court of Appeals in Lockett vs Board of Education of Muscogee County School District, Ga., 342 F. 2d 225 (5 Cir. 1965) was required. The plaintiffs, complaining mainly that the rate of desegregation was too slow, took an appeal to the Fifth Circuit. That Court rendered its per curiam decision on August 18, 1965, reading as follows:

> "IT IS ORDERED that the Judgment of the District Court be and it is hereby vacated and the cause is remanded to the district court for further consideration in the light of Singleton v. Jackson Municipal Separate School District, et al., ______ Fed. 2d ______, No. 22527, decided by this Court on June 22, 1965, and Price v. Denison Independent School District Board of Education, et al., _____ Fed. 2d_____, No. 21632, decided by this Court on July 2, 1965."

It therefore becomes the duty of this court to accept the responsibility delegated by the Fifth Circuit and consider this case in the light of the Singleton and Price decisions. It is to be noted that since Judge West acted herein the Fifth Circuit had again moved forward and the Shreveport and Alexandria divisions of the Western District of Louisiana have implemented the desegregation plans for the Parishes of Bossier and Rapides (Nos. 10687 and 10946 respectively). In his ruling dated August 23, 1965, Judge Richard Putnam advises us that:

> "Additional orders were issued in all other cases pending in the Western District of Louisiana affected by motions identical to those under consid-

FEE
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CHARGE
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ORDER
HEARING
DOCUMENT NO. 19

eration, directing inclusion of the second and eleventh grades in the plans previously approved, effective at the commencement of school for the 1965-66 school year.

"Following this mandate, we now rule that the plans filed by defendants in Civil Docket No. 11,125 for Acadia Parish, and No. 10,903 for Lafayette Parish, in the Lafayette Division, and in No. 11,053, for Evangeline Parish, andNo. 10,912 for St. Landry Parish, in the Opelousas Division, must be amended to include at least four grades this fall in order to comply with the Singleton and Price cases which we have fully discussed in the memorandum opinion of August 13th.

"This decision is predicated upon the conclusion of the Court that the jurisprudential rule evolved in this Circuit since 1954, culminating in *Lockett et al v. Board of Education of Muscogee County*, 342 F 2d 225 (5 Cir. 1965), has been modified by the *Singleton* and *Price* cases to the extent that the minimum requirements for desegregation of public school systems under court approved plans becoming effective in the fall of 1965, are now that (1) four grades, starting at both ends of the scale, must be included initially, and (2) the completion date for inclusion of all grades in the plan should be fall 1967, *unless there are compelling reasons* to extend it to 1968."

Quoting further from Judge Putnam's opinion,

"Distinctly separated from the question of desegregation and the operation of racially nondiscriminatory public school systems under *Brown v. Board of Education*, 347 U. S. 483 (1954), however, is the question of the binding effect of HEW regulations and policies upon the courts in deciding matters at issue in private suits brought to secure the rights recognized in *Brown*, supra.

"As previously pointed out, this Court does not interpret Singleton and Price to require blind adherence to such regulations and policies in these cases. Any such interpretation would not only be destructive of the principle of separation of the powers of the government into the executive, legislative and judicial branches, but would depart completely from the Congressional intent as expressed in the Act itself, Sections 407 (a) and 409, Title IV, Section 603, Title VI (42 U.S.C.A. § 2000c-6, 2000c-8 and 2000d-2).

"Accordingly, after full consideration of these decisions, we hold that the discretion vested in the Court in fashioning and enforcing relief in school desegregation cases in accordance with the facts and circumstances found to exist in each case, is not affected by HEW policies and regulations under Title VI of the Act, except to the extent that they should be considered in balancing the equities along with all other factors involved, and accorded the respect given to such regulations and policies under well-established principles of administrative law."

XERO COPY XERO COPY XERO COPY XERO COPY

Despite the fact that the Fifth Circuit's decision was filed August 18, 1965, counsel for plaintiffs failed to present a motion for "Entry of Revised Order" to this Court until Friday, August 27, 1965, at the same time informing this court that school would open on Monday, August 30, 1965.

West Feliciana Schools have now opened and these petitioners would seek to have this court, at this late date, reach out and order two additional grades in 1965-66, and the balance of the grades desegregated by 1967. This Court considers that a total change now of a plan already in effect and in operation might at this point do violence to the desegregation program as a whole. However, the Singleton and Price cases weigh heavily on this court and must be considered.

To meet the requirements of Lockett, as well as the requirements of Singleton and Price, Judge West's order should be partially reconstructed and the rate of desegregation accelerated to provide for total desegregation with the start of the 1967-68 school term.

The Court recognizes the necessity of adopting the rule and the reasoning in the Singleton and Price cases, supra, in an effort to bring into being a uniform national procedure in the school system.

Judge West's plan as hereinafter embellished satisfies both the rules laid down by the Fifth Circuit in the Lockett case and the policies enunciated by the Department of Health, Education and Welfar. See Singleton v. Jackson Municipal Separate School District, ______F. 2d ______(5 Cir. 1965) [No. 22527, 6/22/65, Slip opinion p. 5]; Price v. Denison Independent School District Board of Education, _____ F. 2d______No. 21632, 7/2/65 (5 Cir. 1965).

IT IS ORDERED that the Judgment entered by Honorable E. Gordon West in this case be, and the same is hereby reinstated, except that the paragraph numbered "2" on Page 3 therein be deleted and replaced with the following:

In each succeeding school year, this planned desegregation shall progress so as to include additional grades as follows:

a) School year 1966-1967 -- grades 2, 3, 8, 9 and 10;

b) School year 1967-1968 -- grades 4, 5, 6, 7 and 11;

c) That in the Fall of 1966/1967 the School Board shall adopt and operate under a plan for guidance patterned by the standards and policies announced by the U. S. Office of Education in establishing adequate safeguards for compliance with the requirements of Title VI of the Civil Rights Act of 1964. See Slip Opinion, Singleton v. Jackson School District, at p. 5.

Nothing contained herein shall in any way be construed to prohibit or preclude the School Board from accelerating this plan if they wish to do so beyond the minimum requirements herein contained.

IT IS FURTHER ORDERED that the motion of plaintiffs for entry of a revised order seeking desegregation of four grades at the start of the 1965-66 school term be, and the same is hereby DENIED.

Frank B. Ellis

U. S. DISTRICT JUDGE

New Orleans, La.

August 31, 1965

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U. S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
FILED
OCT 7 1965
A. DALLAM O'BRIEN, JR.
CLERK

9

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

BATON ROUGE DIVISION

CARTER, ET AL

Plaintiffs

CIVIL ACTION
NO. 3248

vs.

WEST FELICIANA PARISH
SCHOOL BOARD, ET AL

Defendants.

* *

ORDER TO SHOW CAUSE

UPON THE VERIFIED COMPLAINT HEREIN,

IT IS ORDERED, that the defendants show cause at the United States District Court For The Eastern District of Louisiana on October 14, 1965 at 10: o'clock in the United States Courthouse, ~~Room~~ ______, at Baton Rouge, why the Preliminary and Permanent ~~Temporary Restraining~~ Injunction ~~Order~~ herein prayed for should not immediately issue.

IT IS FURTHER ORDERED, that copies of this order to show cause be served upon all parties hereto immediately, and that the United States Marshal endorse his return on the original hereof.

DATED:
Oct. 7, 1965

E Gordon West
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

ROBERT CARTER et al., each individually, etc., Plaintiffs,	)	
v.	)	Civil Action Number 3248
SCHOOL BOARD OF WEST FELICIANA PARISH et al., Defendants.	)	

MOTION FOR SUPPLEMENTAL RELIEF

Plaintiffs move for supplemental relief in the above-entitled action because subsequent experience with the effectiveness and adequacy of the provisions of this Plan and with similar provisions in Plans covering other Parishes has shown that this Plan is inadequate and that it no longer meets judicial standards. Plaintiff therefore moves the Court to modify and supplement its Order of July 30, 1965, as revised by the Order of the Court of August 31, 1965, as follows:

A.

Paragraphs 1, 4, and 5 of the present Order should be deleted. Paragraphs 2, 3, 6, and 7 should be respectively renumbered as paragraphs 1, 2, 3, and 4 of the revised Order.

The following paragraphs should then be added:

5. The School Board shall draw up and submit to the Court by October 19, 1966, a single system of nonracial geographic attendance zones. Maps and charts showing the proposed boundaries of these zones shall be submitted to the Court at that time.

6. The School Board may not use zone boundaries or feeder patterns designed to perpetuate to promote segregation, or to limit desegregation or maintain what is essentially a dual school structure.

7. Regardless of any previous attendance at any other school each student must be assigned to the school serving his zone of residence, and may be transferred to another school only in those cases which meet the following requirements:

a) A student who requires a course of study not offered at the school serving his zone, or who is physically handicapped, may be permitted, upon his written application, to transfer to another school which is designed to fit, or offers courses for, his special needs.

b) A school system may (1) permit any student to transfer from a achool where students of his race are a majority to any other school, within the system, where students of his race are a minority, or (2) assign students on such basis.

8. On a convenient date between March 1 and April 30 in each year, each school system must distribute, by first class mail, a letter to the parent, or other adult person acting as parent, of each student who is then enrolled, except high school seniors expected to graduate, giving the name and location of the school to which the student has been assigned for the coming year pursuant to the desegregation plan, and information con-concerning the bus service between his school and his

neighborhood. All these letters must be mailed on the same day. Each letter must be accompanied by a notice, in a form prescribed by the Commissioner of the Office of Education, United States Department of Health Education and Welfare, explaining the desegregation plan. A copy of the form to be used in the letters is attached at the end of this Order, and is made a part of this Order as though written in extenso herein. The same letter or notice must also be furnished, in person or by mail, to the parent of each prospective student, including each student planning to enter the first grade or kindergarten, as soon as the school system learns that he plans to enroll. A copy of the Notice is attached at the end of this Order, with the same force and effect as though written in extenso herein.

9. The Board must arrange for the conspicuous publication of an announcement, identical with the text of the notice provided for under paragraph 8 above, in the newspapers most generally circulated in the community, on or shortly before the date of mailing under paragraph 8 above. Publication as a legal notice is not sufficient. Whenever any revision of attendance zones is proposed, the school system must similarly arrange for the conspicuous publication of an announcement at least 30 days before any change is to become effective, naming each school to be affected and describing the proposed new zones. Copies of all material published hereunder must also be given at that time to all televsion and radio stations serving the community.

10. A street or road map showing the boundaries of, and the school serving, each attendance zone must be freely available for public inspection at the office of the Superintendant. Each school in the system must have freely available for public inspection a map showing the boundaries of its attendance area.

11. By April 15 of each year, the Board must report to the Court the anticipated student enrollment, by race or color for each grade of each school, for the following school year. The report submitted must include the comparable data for the semester in which the report is sent. Any subsequent substantial change in anticipated enrollment affecting desegregation must be reported promptly to the Court.

12. This report must be accompanied by a map, which must show the name and location of each school facility planned to be used during the coming school year, the attendance zones in effect for each school during the current school year, and any changes in the attendance zones planned for the coming school year. The map need not be of professional quality. A clipping of each newspaper advertisement and any map published under paragraphs 9 or 10 must be sent to the Court within three days after publication and, in the case of proposed revisions, must be accompanied by data showing the estimated change in attendance, by race or color and by grade, and in the racial composition of the professional staff at each school to be affected.

13. Whenever a student is permitted to attend a school other than that serving his zone of residence, and whenever a request for such attendance is denied, the school system must retain records showing (1) the school and grade applied for, (2) the zone of the student's residence and his grade therein, (3) the race or color of the student, (4) the reason stated for the request, and (5) the reason the request is granted or denied. Whenever the total number of transfers permitted from any school exceeds two per cent of the student enrollment at that school, the relevant facts must be reported promptly to the Court.

14. Whenever any report is required by this Order to be submitted to the Court, counsel of record shall be furnished with copies thereof.

15. The Board shall take immediate action to place all programs, facilities, operations, opportunities and facets of the educational system it administers on a Parish wide per-student level. All pupil-teacher ratios for all grades in all schools shall be placed on a Parishwide level. Expenditures shall be made on a Parishwide level of per-student equality, save those expenditures which shall be made to remedy the effects of past discrimination. Where necessary to achieve this goal, schools shall be consolidated or closed, and equipment, fixtures, furnishings, and books shall be transferred in a manner which shall result in such a Parishwide level of equality. All action required by this paragraph must be complete by the opening of the second semester of the 1966-1967 school year.

16. All programs, facilities, operations, opportunities, and facets of the educational system operated by the Board shall be administered on an integrated and nondiscriminatory basis. This paragraph shall be effective immediately upon the signing of this Order.

17. The Board shall provide remedial education programs which would permit students attending or who have attended schools which have suffered from inequality of facilities, equipment, fixtures, books, pupil-teacher ratios and expenditures to overcome past inadequacies in their education.

18. Race or color will henceforth not be a factor in the hiring, assignment, re-assignment, promotion, demotion, or dismissal of teachers and other professional staff, with the exception that assignments shall be made in order to eliminate the effects of past discrimination. Teachers, principals, and staff

members will be assigned to schools so that the faculty and staff is not composed of members of one race. In the recruitment and employment of teachers and other professional personnel, all applicants or other prospective employees will be informed that St. Tammany Parish operates a racially integrated school system and that members of its staff are subject to assignment in the best interest of the system without regard to the race or color of the particular employee.

19. Teachers and other professional personnel will be employed solely on the basis of qualifiecations and without regard to race or color.

20. In the recruitment and employment of teachers and other professional personnel, all applicants and other prospective employees will be informed that the School Board operates a racially integrated school system and that the teachers and other professional personnel in the system are subject to assignment in the best interest of the system and without regard to their race or color.

21. The Superintendent of Schools and his staff will take affirmative steps to solicit and encourage teachers presently employed in the system to accept transfers to schools in which the majority of the faculty members are of a race different from that of the teacher to be transferred. Such transfers will be made by the Superintendent and his staff in all cases in which the teachers are qualified and suitable, apart from race or color, for the positions to which they are to be transferred.

22. The Superintendent will fill all faculty vacancies by reassigning presently employed faculty members and by assigning newly employed faculty members to such vacancies in a manner that will corredt the effects of the past pattern of assignments based upon race, to the end that the faculty of each school will be composed of both white and Negro teachers.

Such assignments and transfers will be made by the Board in those cases in which the teachers are qualified and suitable, apart from race or color, for the position to which they are to be assigned or transferred.

23. Teachers and other professional staff members may not be dismissed, demoted, or passed over for retention, promotion or rehiring on the ground of race or of color. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system shall be filled through recruitment from outside the system unless no such displaced staff member is qualified to fill the vacancy. If, as a result of desegregation, there is to be a reducation in the total professional staff of the school system, the past assignment of any teacher or staff member, where such past assignment was based on race or color, shall not be considered in determining whether he shall be released.

24. The provisions of 45 C.F.R. §§ 181.12 through 181.17, 181.19, 181.31 through 181.35, 181.41 through 181.55, and 181.71 through 181.76, and any further modifications in these provisions authorized by the Commissioner of the Office of Education, of the United States Department of Health,Education, and Welfare, shall hereby become a part of this Order, with the same force and effect as if written in extenso herein.

25. The Board may take no reprisals or retaliation in any manner against its employees or contractors for any connection such employees or contractors may have with any civil rights work or for taking any lawful action directed at the attainment of their rights under law, or at the attainment of the rights of other citizens. No oath or statement of any kind may be required or asked by the Board in relation to any matter connected, specifically or in general, with the above.

Alternatively, but without prejudicing plaintiffs' rights on appeal thereby, the following modifications should be made in the Order signed by the Court on July 30, 1965, as modified by the Order of August 31, 1965:

B.

Paragraphs 1, 4, and 5 of the present Order should be deleted. Paragraphs 2, 3, 6, and 7 should be respectively renumbered as paragraphs 1, 2, 3, and 4 of the revised Order.

The following paragraphs should then be added:

5. Who May Exercise Choice. A choice of schools may be exercised by a parent or other adult person serving as the student's parent. A student may exercise his own choice if he (1) is exercising a choice for the ninth or a higher grade, or (2) has reached the age of fiteen at the time of the exercise of the choice. Such a choice by a student is controlling unless a different choice is exercised for him by his parent or other adult person serving as parent during the choice period or at such later time as the student exercises a choice. Each reference in this Order to a student exercising a choice means the exercise of the choice, as appropriate, by a parent or such other adult, or by the student himself.

6. Annual Exercise of Choice. All students, both white and Negro, shall be required to exercise a free choice of schools annually.

7. Choice Period. The period for exercising choice shall commence on March 1, and end on March 31, preceding the school year for which choice is to be exercised. No student or prospective student who exercises his choice within the choice period shall be given any preference because of the time within the period when such choice was exercised.

8. Mandatory Exercise of Choice. A failure to exercise a choice within the choice period shall not preclude any student from exercising a choice at any time before he commences school for the year with respect to which the choice applies, but such choice may be subordinated to the choices of students who exercised choice before the expiration of the choice period. Any student who has not exercised his choice of school within a week after school opens shall be assigned to the school nearest his home where space is available under standards for determining available space which shall be applied uniformly throughout the system.

9. Public Notice. On or within a week before the date a choice period opens, the defendants shall arrange for the conspicuous publication of a notice describing the provisions of this Decree in the newspaper most generally circulated in the community. The text of the Notice is attached at the end of this Order. Publication as a legal notice will not be sufficient. Copies of this notice must also be given at that time to all radio and television stations serving the community. Copies of this Decree shall be posted in each school in the school system and at the office of the superintendant.

10. Mailing of Explanatory Letters and Choice Forms. On the first day of the choice period, there shall be distributed by first class mail an explanatory letter and a choice form to the parent, or other adult person acting as parent, of each student who will be entering a desegregated grade in the following year, together with a return envelope addressed to the Superintendant. The text for the explanatory letter and choice form shall conform to the forms attached at the end of this Order.

11. Extra Copies of the Explanatory Letter and Choice Form. Extra copies of the explanatory letter and choice form shall be

freely available to parents, students, prospective students and the general public at each school in the system and at the office of the superintendant.

12. Return of Choice Form. At the option of the person completing the choice form, the choice may be returned by mail, in person, or by messenger to any school in the system or to the office of the superintendant.

13. Choices Not on Official Form. The exercise of choice may also be made by the submission in like manner of any other writing which contains information sufficient to identify the student and indicates that he has made a choice of schools.

14. Choice Forms Binding. Once a choice form has been submitted, and the choice period having expired, the choice is binding for the entire school year and may not be changed except in cases of parents making different choices than their children under the conditions set forth in paragraph 5 of this Order and in cases where compelling hardship is shown by the student.

15. Preferences in Assignment. In assigning students to schools, no preferences shall be given to any student for prior attendance at a school, and no choice shall be denied for any reason other than overcrowding. In case of overcrowding at any school, preference shall be given on the basis of the proximity of the school to the homes of the students choosing it, without regard to race or color.

16. Second Choice Where First Choice Is Denied. Any student whose choice is denied must be promptly notified in writing and given his choice of any school in the school system serving his grade level where space is available.

17. Transportation. School buses will be routed to the greatest extent which is reasonable in light of the geographic distribution of students, so as to serve each student choosing any school in the system.

18. Official Not to Influence Choice. At no time shall any official, teacher, or employee of the school system influence any parent, or other adult person serving as a parent, or any student, in the exercise of a choice, or favor or penalize any person because of a choice made. Information concerning individual choices made or schools to which individual students are assigned shall not

be made public.

19. Each new student shall be required to exercise a choice of schools before enrollment. Each such student shall be furnished a copy of the prescribed letter to parents and choice form, by mail or in person, on the date the choice period opens or as soon thereafter as the school system learns that he plans to enroll. Each shall be given an opportunity to exercise his choice during the choice period. A prospective student exercising his choice after the choice period shall be given at least one week to do so.

20. Transfers for Special Needs. Any student who requires a course of study not offered at the school to which he has been assigned, or who is physically handicapped, may be permitted, upon his written application, to transfer to another school which is designed to fit or offer courses for his special needs.

21. Transfers for Students in Non-Desegregated Grades. Any student entering a grade to which the choice provisions of this Order do not yet apply, shall have the right to transfer to any school from which he would otherwise be excluded on account of his race or color.

22. No student shall be segregated or discriminated against on account of race or color in any service, facility, activity, or program (including transportation, athletics, or other extracurricular activity) that may be conducted or sponsored by, or affiliated with, the school in which he is enrolled. A student attending school for the first time on a desegregated basis may not be subject to any disqualification or waiting period for participation in activities or programs, including athletics, which might otherwise apply because he is a transfer student.

23. The Board shall take immediate action to place all programs, facilities, operations, opportunities and facets of the educational system it administers on a Parishwide per-student level of equality. All pupil-teacher ratios for all grades in all schools shall be placed on a Parishwide level of equality. Expenditures shall be made in all areas on a Parishwide level of per-student equality, save those expenditures which shall be made to remedy the effects of past discrimination. Where necessary to achieve this goal, schools shall be consolidated or closed, and equipment, fixtures, furnishings, and

books shall be transferred in a manner which shall result in such a level of equality. All action required by this paragraph shall be complete by the opening of the second semester in the 1966-1967 school year.

24. The Board shall provide remedial education programs which permit students attending or who have attended schools which have suffered from inequality of facilities, equipment, fixtures, books, pupil-teacher ratios, and expenditures to overcome past inadequacies in their education.

25. Teachers and other professional personnel will be employed solely on the basis of qualifications and without regard to race or color.

26. In the recruitment and employment of teachers and other professional personnel, all applicants and other prospective employees will be informed that the School Board operates a racially integrated school system and that the teachers and other professional personnel in the system are subject to assignment in the best interest of the system and without regard to their race or color.

27. The Superintendant of Schools and his staff will take affirmative steps to solicit and encourage teachers presently employed in the system to accept transfers to schools in which the majority of the faculty members are of a race different from that of the teacher to be transferred. Such transfers will be made by the Superintendant and his staff in all cases in which the teachers are qualified and suitable, apart from race or color, for the positions to which they are to be transferred.

28. The Superintendant will fill all faculty vacancies by reassigning presently employed faculty members and by assigning newly employed faculty members to such vacancies in a manner that will correct the effects of the past pattern of assignments based on race, to the end that the faculty of each school will be composed of both white and Negro teachers. Such assignments and transfers will be made by the Board in those cases in which the teachers are qualified and suitable, apart from race or color, for the position to which they are to be assigned or transferred.

29. Teachers and other professional staff members may not be dismissed, demoted, or passed over for retention, promotion, or

rehiring on the ground of race or color. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system shall be filled through recruitment from outside the system unless no such displaced staff member is qualified to fill the vacancy. If, as a result of desegregation, there is to be a reduction in the total professional staff of the school system, the past assignment of any teacher or staff member, where such past assignment was based on race or color, shall not be considered in determining whether he shall be released.

30. Report on Choice Period. The Board shall serve upon the opposing parties and file with the Clerk of the Court on or before January 15, 1967, and each subsequent year on or before June 1, a report tabulating by race the number of choice applications received for enrollment in each grade of each school in the system. The report shall also state any reasons relied upon in denying choices and shall tabulate, by school and race of students, the number of choices denied for each such reason.

31. Report after School Opening. The Board shall serve upon opposing counsel and file with the Clerk of the Court no later than January 15, 1967, and in each subsequent year fifteen days after the opening of schools for the fall semester each year, a report setting forth the following information:

a) The name, address, grade, school of choice, and school of present attendance of each student who has withdrawn or requested withdrawal of his choice of school or who has transferred after the start of the school year, together with a description of any action taken by the defendants on his request and the reasons therefor.

b) The number of faculty vacancies by school, that have occurred or been filled by the defendants since the order of this Court or the latest report submitted pursuant to this subparagraph. This report shall state the race of the teacher employed to fill each such vacancy and indicate whether such teacher is newly employed or was transferred from within the system. The tabulation of the number of transfers within the system should indicate the schools from which and to which the transfers were made. The report shall also set forth the number of faculty members of each race assigned to each school for the current year.

c) A description of all steps and programs instituted by the Board pursuant to paragraphs 23 and 24 of this Order.

30. Whenever any report is required by this Order to be submitted to the Court, counsel of record shall be furnished with copies thereof.

31. The provisions of 45 C.F.R. §§ 181.12 through 181.17, 181.19, 181.31 through 181.35, 181.41 through 181.55, and 181.71 through 181.76 and any further modifications in these provisions authorized by the Commissioner of the Office of Education, of the United States Department of Health, Education, and Welfare shall hereby become a part of this Order, with the same force and effect as if written in extenso herein.

32. The Board may take no reprisals or retaliation in any manner against its employees or contractors for any connection such employees or contractors may have with any civil rights work or for taking any lawful action directed at the attainment of their rights, or at the attainment of the rights of other citizens. No oath or statement of any kind may be required or asked by the Board in relation to any matter connected, specifically or in general, with the above.

33. All new school buildings or facilities that are constructed must be so situated that they will be utilized equally by white and Negro neighborhoods.

34. A copy of all forms to be used, letters to be sent, and notices to be given are attached at the end of this Order, and are made a part of this Order with the same force and effect as though written in extenso herein.

35. When a choice is denied, the School Board must retain records showing (1) the school and grade applied for, (2) the race or color of the student, and (3) the reason the request is granted or denied.

36. Within their respective authority, the Board and its employees have the affirmative duty of protecting all persons exercising rights under, or otherwise affected by, the Order. The Board and its employees must take appropriate action with regard to any student or staff member who interferes with the successful operation of the Order, whether or not on school grounds. If the Board and its employees are not able to provide sufficient protection, they must seek whatever assistance is necessary from other appropriate officials.

Plaintiffs pray that this Court retain jurisdiction of this matter and award such additional relief as the needs of justice may require.

Plaintiffs further pray that this Court award unto plaintiffs the costs and disbursements of this action, and that the Court award reasonable attorneys' fees to plaintiffs.

Respectfully submitted,

COLLINS, DOUGLAS & ELIE
2211 Dryades Street
New Orleans, Louisiana

August 23, 1966

By: /s/ NILS R. DOUGLAS

Of Counsel:

Richard B. Sobol
2209 Dryades Street
New Orleans, Louisiana

Alvin J. Bronstein
603 N. Farish Street
Jackson, Mississippi

Murphy W. Bell
971 South 13th Street
Baton Rouge, Louisiana

Carl Rachlin
38 Park Row
New York 38, New York

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

BATON ROUGE DIVISION

ROBERT CARTER et al., each individually, etc., Plaintiffs,

v.

SCHOOL BOARD OF WEST FELICIANA PARISH et al., Defendants.

Civil Action Number 3248

NOTICE OF MOTION FOR SUPPLEMENTAL RELIEF

To: Each party and the attorney of record for each party herein.

Please take notice that on September 2, 1966, at the Court Room of the United States District Court, in the Post Office Building, Baton Rouge, Louisiana, at 10:00 A.M. or as soon thereafter as counsel may be heard, plaintiffs will pray that this Court modify and supplement its Order of July 30, 1965, as revised in the Order of August 31, 1965, by making the modifications contained in the attached Motion for Supplemental Relief.

COLLINS, DOUGLAS & ELIE
2211 Dryades Street
New Orleans, Louisiana

August 23, 1966

By: /s/ NILS R. DOUGLAS
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that on this date copies of the Motion for Supplemental Relief, Notice of Motion, and Memorandum in support of the Motion were served upon Jack P.F. Gremillion, Esq., Harry J. Kron, Esq., Fred C. Jackson, Esq., and Richard H. Kilbourne, Esq., attorneys for defendants herein, by placing them in the United States Mail addressed to each of the above-named attorneys first class, special delivery, postage prepaid.

August 23, 1966

/s/ NILS R. DOUGLAS

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

ROOM 408 - 400 ROYAL ST.
NEW ORLEANS, LA. 70130

August 5, 1965

Mr. Nils R. Douglas
Attorney at Law
2211 Dryades Street
New Orleans, Louisiana

Re: No. 22855 - Robert Carter, et al
-vs- School Board of West Feliciana Parish, et al

Dear Sir:

I am authorized by this court to advise that your **Motion for Further Injunctive Relief Pending Appeal** was received and filed this 5th day of August, 19 65, and under the rules and practice of this Court will be presented for ruling without oral argument on or about August 12, 1965* together with any response or opposition that may be filed by opposing counsel by that date.

Very truly yours,

Edward W. Wadsworth
EDWARD W. WADSWORTH,
Clerk

/bwc
cc: Mr. Murphy W. Bell
Mr. Carl Rachlin
Mr. Richard B. Sobol
Hon. Jack P. F. Gremillion
Mr. Harry J. Kron, Jr.
Mr. Richard H. Kilbourne

---

* This is only the date on which it is now expected that the matter will be forwarded for ruling, and does not mean that this office will be able to advise counsel of the Court's action by then. Counsel should allow at least ten days' time thereafter for advice as to the Court's ruling before making inquiry.

UG 2 [illegible] 1965

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

ROOM 408 - 400 ROYAL ST.
NEW ORLEANS, LA. 70130

August 18, 1965

Mr. A. Dallam O'Brien
Clerk
U. S. District Court
New Orleans, Louisiana

Re: No. 22855 - Robert Carter, et al
-vs- School Board of West Feliciana Parish, et al.
Baton Rouge Div. - No. 3248-
Civil Action

Dear Sir:

Find enclosed certified copy of order this date entered by the Court issued as and for the mandate. Enclosed also is a copy of the Singleton and Price decisions referred to therein.

Returned herewith are your original papers filed as the record on appeal. Please acknowledge.

Very truly yours,

EDWARD W. WADSWORTH,
CLERK

G.F. Ganucheau

By________________________
G. F. Ganucheau
Deputy Clerk

GFG/lgc
Enc.
cc: Mr. Murphy W. Bell
Mr. Carl Rachlin
Mr. Richard B. Sobol
Mr. Richard Kilbourne
Hon. Jack P. F. Gremillion
Mr. Harry J. Kron, Jr.

August 23, 1965

Murphy W. Bell, Esq.
971 S. 13th Street
Baton Rouge, Louisiana

Dear Murphy:

I received in the mail this morning an order of the Fifth Circuit in your West Feliciana Parish case. My heartiest congratulations to you and to the others who worked with you in producing this fine victory.

I look forward to seeing all of you very soon.

With kindest personal regards,

Sincerely,

CARL RACHLIN
General Counsel

CR/cs

cc: Richard Sobol, Esq.
Collins, Douglas, & Elie, Esqs.
Ronnie Moore

M E M O R A N D U M

TO: MESSRS. FARMER, WILEY, CARTNER, RICH

FROM: CARL RACHLIN September 9, 1965

CORE brought a school case in West Feliciana. Judge E. Gordon West directed desegregation at the rate of two grades per year.

I instructed counsel to appeal to the Fifth Circuit. In less than three weeks the appeal was heard and decided in our favor.

As a result, the twelve grades will be desegregated in three years:

1965 - 2 grades
1966 - 5 grades
1967 - 5 grades

CR/cs

LAWYERS CONSTITUTIONAL DEFENSE COMMITTEE
OF THE AMERICAN CIVIL LIBERTIES UNION
LOUISIANA OFFICE
2209 Dryade Street, New Orleans, Louisiana 70113
(504) 523-1797
RICHARD B. SOBOL, STAFF COUNSEL

La Schools

NATIONAL OFFICE
156 Fifth Avenue
New York, N.Y. 10010
(212) YU 9-7530
CARL RACHLIN
President
HENRY SCHWARZSCHILD
Executive Secretary

MISSISSIPPI OFFICE
603 North Farish Street
Jackson, Mississippi 39202
(601) 948-4191
ALVIN J. BRONSTEIN
Chief Staff Counsel

ALABAMA OFFICE
31½ Franklin Street
Selma, Alabama 36701
(205) 872-3427
DONALD A. JELINEK
Staff Counsel

August 23, 1966

Carl Rachlin, Esq.
38 Park Row
New York, New York 10038

Dear Mr. Rachlin,

We've enclosed copies of two orders we have, with the co-operation of Justice, obtained in the past week and a half. Washington Parish is waiting for a hearing, and West Feliciana Parish will be filed tomorrow for a hearing September 2nd. Currently, we're pressing the equalization idea as strongly as we can. Drawing up tables based on public records of school expenditures was not what I thought I'd be doing when I came down here, but it does make for a fairly dramatic chart. Hopefully, it will impress the judge sufficiently.

We'll send copies of further orders as they are handed down. Until then, we'll enjoy the fight and sleep the sleep of the good and the true.

Yours,

Rick Seymour

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

ROBERT CARTER, et al., each individually, etc., Plaintiffs,	)	
v.	)	Civil Action Number 3248
SCHOOL BOARD OF WEST FELICIANA PARISH et al., Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR SUPPLEMENTAL RELIEF

Jurisdiction of this Court is invoked under the United States Constitution and the Fourteenth Amendment thereto, Title 28 U.S.C. § 1331 and 1343, Title 42 U.S.C. § 1981, 1983, 1985(3), and 1988. In addition, jurisdiction of this Court is invoked under Title 42 U.S.C. § 2000(c) and 2000(d) and under the Order signed by the Court on July 30, 1965.

I.

THE PLAN ORDERED BY THE COURT WAS NOT A FREEDOM-OF-CHOICE PLAN.

Paragraph 1 of the Order continues for future years all school assignments already made for the 1965-1966 school year, notwithstanding the fact that these assignments were made solely on a racial basis. The Order restricts the exercise of choice to those students being initially assigned to schools within the system, and merely permits transfer at the instance of a parent or child. The Order does not require the parent of each child within the system and of each child who may come into the system in the future to exercise some choice, one way or another. As such, the Order does not meet the minimum standards established by the United States Department of Health, Education, and Welfare in its Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964, hereinafter referred to as the HEW Guidelines (45 C.F.R. 181.43) which require that every student, white and Negro, within the system and coming into the system, indicate his choice of schools. The Order should provide a non-racial basis for assignment of students in desegregated grades who fail to indicate their choice. Kemp v. Beasley, 352 F.2d 14, 22 (8th Cir., 1965). In the absence of such provisions, the Order is merely a transfer plan superimposed on a system of racial assignments.

II.

PROCEDURES FOR REQUESTING TRANSFERS ARE VAGUE AND OVERLY RESTRICTIVE AND PERMIT THE SCHOOL BOARD TO EVADE DESEGREGATION.

a) To ensure the integrity of a free-choice plan, the conditions under which a choice is exercised must be specific and as easy as possible to fulfill. The Order does not require the Board to mail the notices and application form for transfers to each parent, nor does it specify an acceptable manner of returning the forms. The HEW Guidelines (45 C.F.R. 181.46) require that the transfer forms be mailed to each parent with the School Board's notice of opportunity for transfer, and specify that the transfer form may be returned in person, by messenger, or by first class mail to the office of the School Board or to any school in the system. These provisions should also be included in the Order.

b) The Order established no minimum length of time for exercise of choice. Paragraph 5(a) of the Order allows only a ten-day period for exercise of an option to transfer after initial assignment has been made. If this provision is interpreted as meaning that each student has ten days each year within which he may transfer, the time period is inadequate to permit the parents involved to consider and exercise their choice, particularly when the parents are required to obtain the forms after notice of assignment has been made and the parents have considered the problem and decided. The form must then be returned to the Board within ten days from the first notice the parents received. Such a variety of steps cannot reasonably be required to be performed within ten days.

c) If paragraph 5(a) is interpreted to mean that a student may transfer only within ten days of his initial assignment, a student coming into the system for the first time would thus have one and only one opportunity to transfer; a student within the system already would have no chance to transfer at all, whether his grade is desegregated or not. This paragraph is ambiguous and, however it is to be interpreted, it should be changed to provide for a definite annual choice period of at least thirty days, as provided in the HEW Guidelines (45 C.F.R. 181.44). Students should also have an opportunity to exercise their choice after the choice period is over, although their choice may be subordinated to the choice of a student who exercised his choice within the period. HEW Guidelines, 45 C.F.R. 181.45.

d) Paragraph 5(b) of the Order allows the Board to continue using existing transfer procedures. Because a free choice plan "tends to place the burden of desegregation on Negro or other minority group students and their parents," HEW Guidelines, 45 C.F.R. 181.54, and because "even when school authorities undertake good faith efforts to assure its fair operation, the very nature of a free choice plan and the effect of longstanding community attitudes often tend to preclude or inhibit the exercise of a truly free choice", Ibid., it is important that parents of children wishing to transfer under this Order know in advance the criteria that will be applied to their request. Without such knowledge, parents may well assume that their request will be met with denial, and will for that reason fail to apply. Transfer procedures and criteria should be included in the notice to be sent to parents before the beginning of the choice period.

e) The Order did not specifically state the nature of the "existing transfer procedures" which the Board is to be allowed to continue. The Fifth Circuit held in Stell v. Savannah-Chatham County Board of Education, 333 F.2d 55 (1964) that a free choice plan must give students entitled to a choice of schools a clear opportunity to exercise that choice. Plaintiffs respectfully submit that transfer procedures may substantially affect the integrity of the free choice plan adopted by this Court, and that reliance on any transfer procedures not specifically outlined in the Court's Order may well amount to a denial of relief to which plaintiffs are entitled. Cf. the highly detailed provisions of the HEW Guidelines (45 C.F.R. 181.42 through 181.53 and 181.71 through 181.75) and forms for notices, letters, and applications for transfer approved by the United States Department of Health, Education, and Welfare attached at the end of the Motion for Supplemental Relief. See also the detailed provisions of the revised Plans adopted in Jenkins v. City of Bogalusa School Board, Civil Action Number 15798-B, (E.D.La., New Orleans Division, August, 1966) and in Smith v. St. Tammany Parish School Board, Civil Action Number 15463-B (E.D.La., New Orleans Division, August, 1966).

f) Proposed application forms have not been submitted to the Court, nor has the Court included a proposed letter to parents within the terms of its Order. To ensure the integrity of the Plan, these documents should be included in the Order of the Court. Plaintiffs submit that the forms approved by the United States Department of Health, Education, and Welfare were extremely carefully drafted by experts familiar with all phases of the problems incident to school desegregation and with the difficulties involved in each type of plan. These forms are the result of experience in many school districts throughout the Nation, and should be included in, and made a part of, the Court's Order.

g) Paragraphs 1 and 5(c)(6) of the Order provide that an application for transfer may be denied solely on the ground that there is space available in a "comparable" school closer to the applicant's home. It is the position of the School Board that all schools within the Parish are "comparable." Consequently, this provision would seem to permit the Board to assign a Negro applicant for transfer to a white school, to a Negro school on the ground that the Negro school is closer to the applicant's home than is the white school to which transfer is requested. This provision could easily result in evasion of requests for transfer, and should be deleted.

h) Paragraphs 1 and 5(c) of the Order provide that the following are factors upon which denial of a request for transfer may be based:

1)the availability of space and of other facilities in the school to which transfer is requested;

2) the availability of requested or desired courses of study in the school to which the transfer is requested;

3) the age of the pupil as compared with the ages of pupils already attending the school to which transfer is requested.

This provision of the Order imposes requirements upon Negroes wishing to transfer to white schools which are not imposed upon whites attending those schools. Plaintiffs submit that when the other students in such a school are attending that school on the basis of unconstitutional assignments based on race, a student seeking transfer to such a school cannot be denied admission on the ground of the pre-existing assignments of the students in the school. In Stell v. Savannah-Chatham County Board of Education, 33 F.2d 55, 65, the Fifth Circuit held that:

> "each child in the system may attend the school he chooses to attend, without regard to race so long as space is available in the school, and where it is not available to all it is to be awarded on the basis of the proximity of the residence of the pupil to the school."

The HEW Guidelines (45 C.F.R. 181.49) state that no preference may be given to students for prior attendance at a school if such preference would deny other students their free choice of schools under the plan.

i) To maintain the integrity of a freedom-of-choice plan, a student whose choice has been denied should be afforded an opportunity to request transfer to another school. HEW Guidelines, 45 C.F.R. 181.49. Paragraph 5(e) of the Order provides that a parent who wishes to object to denial of a requested transfer must have "filed in writing with the Superintendant of Schools or his designated representative" his objection within but five days after receipt of the notification of the denial. Because of the many factors a conscientious parent must consider when choosing a school for his or her child, a period of five days is grossly inadequate. The parent must discover whether there are curriculum differences in the various school, and what effect they will have on his child's education and needs. He must consider the availability of transportation, the amount of traffic on the way, the types of neighborhoods involved, and many other factors. It would not be equitable to allow only five days for the evaluation of all these factors and the "filing" of objections.

III.

A VOLUNTARY TRANSFER PLAN IS NOT EFFECTIVE RELIEF IN THE WEST FELICIANA PARISH SCHOOL SYSTEM.

In West Feliciana Parish, the only means by which the School Board can fulfill the mandate of Brown v. Board of Education, 349 U.S. 249 (1955) "to effectuate a transition to a racially non-discriminatory school system" is by the establishment of attendance zones on a non-discriminatory basis. Northcross v. Board of Education of City of Memphis, 302 F.2d 818, 823 (6th Cir., 1962) held that "minimal requirements for non-racial schools are geographic zoning, according to the capacity and facilities of the buildings and admission to a school according to residence as a matter of right."

Freedom of choice in this Parish has been shown to be an ineffective means of desegregating schools by the experience of the past year under the Court's Order. "The first Brown case decided that separate schools organized on a racial basis are contrary to the Constitution of the United States...." Northcross, supra at p. 823. (Emphasis supplied by the Court.) The fact that a small number of applicants has successfully transferred "is not desegregation, nor is it the institution of a plan for a non-racial organization of the Memphis school system." Northcross, supra at p. 824. For these reasons, early establishment of nonracial geographic attendance zones is the only workable means of securing the Negro students of West Feliciana Parish the protection of Brown v. Board of Education, supra, and of the Fourteenth Amendment.

IV.

OTHER OBJECTIONS TO THE ORDER

a) The Order made no provision for integration of facilities, programs, and school bus transportation, as is required by Singleton v. Jackson Municipal Separate School District, 355 F.2d 865 (5th Cir., 1966). See HEW Guidelines, 45 C.F.R. 181.14.

b) The Order made no provision for desegregation of the faculties of the schools of West Feliciana Parish. Faculty desegregation must be begun in this school year. Singleton, supra. At the least, vacancies occurring during the course of the school year should be filled by assigning a teacher of a race different from that of the teacher whose position is being filled to the position.

c) The Order makes no provision for transfer upon request by Negro students in grades not reached by the plan. The Fifth Circuit held in Singleton, supra at p. 869:

> "The school children in still-segregated grades in Negro schools are there by assignment based on their race. This assignment was unconstitutional. They have an absolute right, as individuals, to transfer to schools from which they were excluded because of their race."

d) The Order made no provision for equalizing expenditures on schools formerly maintained by defendant Board on a racial basis. The radical disparity that exists between white and Negro schools in many areas has a direct and substantial effect upon the quality of the education afforded Negro students. Although Brown v. Board of Education, 347 U.S. 483, required that school boards move to eliminate the segregation of schools and to that extent repudiated the "separate but equal" doctrine, it did not remove the constitutional obligation of the school boards to provide all students with an education of equal quality.

e) The Order in general is too vague to relieve the School Board from the difficult task of articulating, and conforming to, judicially approvable standards and of formulating workable mechanics for free choice plans. The vagueness of the Order has helped to render freedom of choice an inadequate means of desegregating the schools of the Parish. See the detailed provisions of the plans ordered by the Court in Jenkins v. City of Bogalusa School Board, supra, and in Smith v. St. Tammany Parish School Board, supra.

V.

A full evidentiary hearing on these matters, all of which affect the adequacy of the Order entered by the Court on July 30, 1965, as modified by the Order entered on August 31, 1965, is a matter of right. Bradley v. School Board of City of Richmond, 382 U.S. 103 (1965)(Per Curiam); Rogers v. Paul, 382 U.S. 198 (1965)(Per Curiam).

Respectfully submitted,

COLLINS, DOUGLAS, & ELIE
2211 Dryades Street
New Orleans, Louisiana
523-5197

August 23, 1966

By: /s/ NILS R. DOUGLAS
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[illegible], MARK et al. VS. KATZ, HERMAN CLERK of NEW YORK 1966

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COURT OF APPEALS
OF THE STATE OF NEW YORK

AMELIA CASSESE Petitioner-Appellee -against- HERMAN KATZ, as clerk of the City of New York, Respondent-Appellant	**Notice of Motion for Leave to Appear as Amicus Curiae** **Index no. 12215**

MARIA MONPLASIR, MICHAEL YORKE AND LARS EKWURZEL, Petitioner-Appellee -against- HERMAN KATZ, as clerk of the City of New York, Respondent-Appellant	Notice of motion for Leave to Appear As Amicus Curiae Index No. 12121

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of CARL RACHLIN, sworn to the First day of September, 1966 and upon all proceedings heretofore had herein the undersigned will move this court at a term thereof to be held at the Court of Appeals Courthouse, located at Albany, N. Y., on the second day of September, 1966 at 10 o'clock A. M. or as soon thereafter as counsel can be heard for an order granting the American Jewish Committee, the American Jewish Congress, the Anti-Defamation League of B'nai Brith, the Catholic Interracial Council, the National Association for the Advancement of Colored People, the New York Civil Liberties Union, the Office of Church and Race of the Protestant Council of New York City, the Scholarship, Education and Defense Fund for Racial Equality on behalf of the Congress of Racial Equality, and the Urban League of Greater New York leave to appear as amici curiae in the above entitled appeal, and for such other and further relief as to the court may seem just and proper in the premises.

Dated: New York, New York.

August 18, 1966

Yours, etc.

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COUNTY OF NEW YORK)

AFFIDAVIT

CARL RACHLIN, being duly sworn, deposes and says:

1. I am a member of the Bar of the State of New York and Legal Director of the Scholarship, Education and Defense Fund for Racial Equality (hereinafter referred to as SEDF). I am familiar with the facts herein set forth. I submit this affidavit in support of the application of SEDF on behalf of the Congress of Racial Equality, the American Jewish Committee, the American Jewish Congress, the Anti-Defamation League of B'nai Brith, the Catholic Interracial Council, the National Association for the Advancement of Colored People, the New York Civil Liberties Union, The Office of Church and Race of the Protestant Council of New York City, and the Urban League of Greater New York for leave to appear as amici curiae in the above entitled matter.

2. The American Jewish Committee is a pioneer human relations agency greatly concerned with the issues and outcome of this case, feeling that there exists herein a challenge to processes of government of the City of New York as constituted under the Charter. The action of the Police Commissioner in establishing a civilian review board is an important contribution to the improvement of community relations and is an administrative innovation consistent with the responsibilities of his office.

3. The American Jewish Congress is an organization of American Jews established in part to promote the civil and political equality of all Americans.

4. The Anti-Defamation League of the B'nai Brith is an organization devoted to the cause of freedom for all and the protection of basic constitutional rights.

5. The Catholic Interracial Council of New York composed of white and Negro Catholics was founded in 1934 to combat racial bigotry and discrimination. It is active in the continuing struggle to secure for minority groups the same rights and provileges that other Americans already enjoy.

with thousands of members, many in New York City, which is devoted to racial equality. It recognizes that problems related to police-civilian relations are crucial in a democratic society.

7. The National Association for the Advancement of Colored People is an organization devoted to obtaining equal justice for Negro citizens by lawful and peaceful means. Among the rights sought to be secured by law is that of equal treatment by the police officers and impartial review of the actions of such officers.

8. The New York Civil Liberties Union, an affiliate of the American Civil Liberties Union for the New York State area is a non-partisan and non-partisan and non-profit organization devoted to protecting individual rights and liberties guaranteed by the State and Federal Constitutions.

9. The Scholarship, Education and Defense Fund for Racial Equality is devoted to securing protection for the legal rights of minority groups.

10. The Urban League of Greater New York is a social welfare organization designed to obtain equal opportunities and social justice in the Greater New York area. One of its primary concerns in the New York Area has been the quest for equal treatment for all persons before the law.

11. The brief which *amici curiae* would submit if this motion is granted as attached hereto, SEDF believes that this Court will benefit from hearing the fullest possible presentation of the arguments involved in this case.

WHEREFORE, your deponent respectfully requests that the instant application be granted in all respects and that the aforementioned organizations be given leave to appear as *amici curiae* on the attached brief in this action

Sworn to before me this

1st day of September, 1966.

Leon Mandel

LEON MANDEL
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-7690985
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1968

Carl Rachlin

Carl Rachlin

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of

MARIA MONPLAISIR, MICHAEL J. YORK, AND
LARS EKWURZEL,
-against-

HERMAN KATZ,
AS CLERK OF THE CITY OF NEW YORK.

BRIEF OF AMERICAN JEWISH COMMITTEE; AMERICAN JEWISH CONGRESS; CATHOLIC INTERRACIAL COUNCIL; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; NEW YORK CIVIL LIBERTIES UNION; SCHOLARSHIP, EDUCATION & DEFENSE FUND FOR RACIAL EQUALITY; CONGRESS OF RACIAL EQUALITY; AND URBAN LEAGUE of GREATER New York AS AMICI CURIAE.

STATEMENT OF THE CASE

Petitions were filed pursuant to Section 37 of the Municipal Home Rule Law on July 7, 1966, in the office of the Clerk of the City of New York to amend Subdivision a of Section 434 of the New York City Charter to prohibit the creation or maintenance of a board for the review of civilian complaints against members of the police department composed of members who are not deputy police commissioners.

Section 37 of the Municipal Home Rule Law requires that the City Clerk issue ".... a certificate that the petition complies with or does not comply with all the requirements of law." Pursuant to this requirement on August 5, 1966, the Clerk of the City of New York certified that the petitions failed to meet all the requirements of law.

On July 29, 1966, Marie E. Monplaisir, Michael J.York, and Lars Ekwurzel petitioned for an order pursuant to Section 37 of the Municipal Home Rule Law delcaring the petitions filed with the clerk to be valid and directing the City Clerk to transmit his certificate that the petitions comply with the requirements of law to the Council of the City of New York.

The American Jewish Committee, The American Jewish Congress, The Catholic Interracial Council, The National

Association for the Advancement of Colored People, The New York Civil Liberties Union, The Scholarship , Education, and Defense Fund For Racial Equality on behalf of The Congress of Racial Equality, and the Urban League of Greater New York appear in this case as amici curiae for the purpose of showing that the petitions do not comply with the provisions of Section 37 of the Municipal Home Rule Law and, therefore, that the City Clerk acted correctly and according to his duty by certifying that such petitions failed to meet the requirements of law.

POINT I.

HISTORICALLY THE SCOPE OF INITIATIVE AND REFERENDUM HAS BEEN LIMITED TO REMEDYING LEGISLATIVE ABUSES.

We beleive that in order to understand the nature of initiative and referendum in New York State and New York City, it is important to examine their historical development.*

Initiative and referendum have been and still are considered extraordinary measures. In the United States, they arose specifically as corrective measures to combat abuses of legislative power; that is, to act where the legislature had failed to do its duty.

Eighteenth century constitution makers, distrusting executive power, made the legislature substantially omnipotent. The electorate was restricted to the single function of choosing representatives and electing officials. When the legislature began to abuse its power, becoming unresponsive to the wishes of the people, constitutional limits were placed upon legislative prerogative and a movement seeking initiative action arose. In 1821, New York became the first state beyond New England borders to submit its constitution to popular vote, in contrast to earlier constitutions, which had been ratified by convention. By 1840, other states were following suit. Gradually direct action by voters was expanded to include ordinary as well as constitutional legislation. It was recognized, however, that once the people secured the opportunity to adopt their own laws all other difficulties would not vanish. Initiative action was not and could not be a panacea. Provisions for initiative and referendum were utilized by municipalities and states " not from a popular½ conviction that they promise a wholly satisfactory method of law making, but from a widespread impression that only through these agencies can present day legislative abuses be eradicated."[1](emphasis added)

---

* NOTE: Although initiative and referendum are technically distinct procedures, "referendum" meaning approval by the electorate of action previously taken by the legislature and "initiative" meaning direct initiation of legislation without prior action by the legislature, no distinction is made in this brief or the petitions inquestion.

In short, initiative and referendum were intended to be used restrictively, as a remedy for legislative abuses and not as an unfettered license to register displeasure with the acts of any government official. One authority noted:

> when we consider the vast number of bills passed by the state legislatures and of ordinances and resolutions passed by municipal councils, it immediately becomes evident that no one but a lunatic would propose the submission of all these measures to the people for formal approval, unless he considered most of this legislation unnecessary.[2]

This notion of the restricted scope of initiative and referendum has prevailed to this day. Kupferman v. Katz, 243 NYS 2d 773(1963); Swanker v. City of Amsterdam, 5 Misc. 2d 932, 161 NY2d 932 (1937); Matter of McCabe v. Voorhis , 243 NY 401(1926); Matter of Warden, 275 App.Div. 1000, aff'd 300 NY 39(1989).

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[1] Munro, William B.(ed), The Initiative, Referendum, and Recall , D. Appleton & Co.(NY:1912)p.15

[2] Wilcox, Dr. Delos F., Government By All the People, Macmillan (NY:1912)p.132

Representative democracy as embodied in the system of government established by the Constitution and laws of both the United States and the State of New York includes the idea that laws be enacted by a duly elected legislative assembly and that direct action by the electorate, which may disrupt the orderly procedure of government, be reserved for exceptional situations, Lynch v.O'Leary, 178 Misc.567,2 NY2d 588. Thus

> ... direct legislation in cities must always rest on some constitutional or statutory grant of power. Government by représentation is still the rule. Direct action by the people is the exception.(Matter of McCabe v. Voorhis,supra at 413).

POINT II

THE PROPOSED LOCAL LAW DOES NOT IN FACT CONSTITUTE A CHARTER AMENDMENT AND IS THEREFORE UNAUTHORIZED BY SECTION 37 OF THE MUNICIPAL HOME RULE LAW OF NEW YORK STATE.

The petitioners contend Section 37 of the Municipal Home Rule Law of New York State furnishes the express statutory authorization necessary for their action. The law they propose, however, does not properly fall within the scope of that section.

Section 37 provides for the adoption by initiative for amendments to the City Charter. The essential requirement of this section, as emphasized by New York Courts, is that the proposed local law by *in fact* a charter amendment, as distinguished from other local laws, ordinances and resolutions which differ in form as well as content from charter provisions. See *Maylander v Morrison*, 260 App.Div. 892, aff'd 284 NY 575(1940); *Matter of Astwood v. Cohen*, 291 NY 484(1944); *Noonan v. O'Leary*, 132 NYS2d 726(1954); *Hacker v. Common Council of Ithaca*, 49 Misc.69(1966).

The New York City Charter is unusual in that it is a "short form charter." This form of charter was proposed by the 1936 Charter Revision Commission which envisioned it as " the fundamental plan of the city government.... and the general principles which are to govern its operation." (*Report of the New York City Charter Revision Commission*, 1936, page 6.) to be supplemented by the Administrative Code "for the regulation of numerous details and the guidance of the departments."(Id.at 7) Commentaries at the time of its creation make it clear that the charter was intended only to:

> ...outline in skeleton form the agencies of the city government and their basic function.It does not purport to embody all of the provisions of law relating to the government of the city. It provides the structural framework of the city government. It is intended to set forth the organic law relating to the city. It was intended that the details of administration be included in an administrative code.Such a code was to enact all provisions of law affecting the city.which were consistent with the provisions of law of the new charter.
>
> An analogy might be drawn in describing the relationship between the administrative code and the charter as on a par with the relationship between the statutory law and constitution of a sovereign body,wherein those provisions which were intended to be flexible and yield to changing conditions would be subject to easy amendment, while primary grants of power would be contained in a body of law which would express fundamental principles and ideals of government.(New York State Constitutional Convention Committee Report, 1938, Volume 5, pp.5-6)

Thus section 434a of the Charter under which the police commissioner derives authority to establish a civilian compliant review board states in very general terms that "the commissioner shall have cognizance,and control of the government, administration, disposition and discipline of the department and of the police force of the department." This is in sharp contrast to the charters of most New York municipalities which are "long form"; that is, they define and delineate in detail the scope of permissible official action and administrative conduct.

In Matter of Warden, supra, there was an attempt to alter by initiative action the New burgh City Charter to provide for minimum annual salaries to members of the police department. The Appellate Division of the Supreme Court (Second Department) by a divided court upheld the dismissal on the merits of the petition for an order under section 16 of the City Home Rule Law and section 335 of the Election Law, summarily determining objections to the form, sufficiency and validity of a petition for the submission to the electors of Newburgh of a proposed charter amendment. This decision was affirmed without opinion by the Court of Appeals. In holding the law proposed by the petitions to be an appropriate charter amendment the Court noted that the long form charter in effect included an administrative code within it. The short form charter of New York City with its separate administrative code was specifically distinguished. In municipalities such as Newburgh the proposed local law on procedures for handling civilian complaints against the police might indeed be an appropriate amendment to the city charter. See Matter of Warden, supra; Hacker v. Common Council of Ithaca, supra; however, it is entirely inappropriate as an amendment to the charter of New York City which is a precise statement embodying broadly phrased grants of power and general principles.

An attempt by the Patrolmen's Benevolent Association to characterize a proposal similar to that presently at issue as an amendment to the New York City Charter was rebuffed by the Court of Appeals in Matter of Astwood v. Cohen, 291 NY 484(1944). On that occasion, the P.B.A. proposed a local law by initiative providing for a salary bonus to policemen and firemen, which law purported to be an amendment to the City Charter and in accordance with the predecessor of Section 37 of the Municipal Home Rule Law, Section 19-A of the City Home Rule Law, which provided for amendment of the city charter through initiative and referendum. A mandamus action was brought under Article 78 of the Civil Practice Act to compel the Board of Elections to disregard the PBA's petition and omit the proposed local law from the ballot, on the theory that the local law proposed by the petition was not an appropriate amendment to the charter. The Court of Appeals, in affriming the orders of the lower courts granting the mandamus, stated,

> Even though Sections of the Municipal Home Rule Law shouldbe construed liberally according to Section 31 [Note: Now Section 351], liberal construction may not, however, ignore the legislative mandate that only amendments to the charter as distinguished from other laws, may be enacted by the process of initiative and referendum. (Id. at 488)

The decision went on to note that the specificity of the proposed law made it an inappropriate amendment to the short form charter of New York City. The law here proposed is equally inappropriate as an amendment to the city charter and invalid for precisely the same reasons.

POINT III

THE PROPOSED LOCAL LAW WOULD IN FACT ONLY BE APPROPRIATE AS AN AMENDMENT TO THE ADMINISTRATIVE CODE.

Although drawn in the guise of a charter amendment, the proposed local law would, in fact, only be appropriate as an amendment to the Administrative Code. This is precisely the characterization given a proposed local law too detailed to be an appropriate charter amendment by the Court of Appeals in the *Matter of Astwood v. Cohen*, *supra*, at 489. Unlike the Charter, which makes no mention of procedure for discipline within the police department, the Administrative Code devotes an entire detailed section to this subject. (Section 434a-14.0, New York City Administrative Code). It is clear therefore, that provisions such as that proposed by the Conservative Party are precisely the "questions of administrative detail " envisioned by the New York City Charter Revisions Committee of 1936 as properly within the scope of the Administrative Code. See *Report of the New York City Charter Revision Commission of 1936*, page 41. There is no statutory authority for amending the Administrative Code by initiative action.

POINT IV.

THE POWER TO INITIATE LEGISLATION SHOULD NOT EXTEND TO PURELY ADMINISTRATIVE FUNCTIONS

Under the general provisions of Section 434a of the New York City Charter, supra, and the more specific provisions of Section 434a-10.0 of the Administrative Code, supra, the Police Commissioner is empowered to appoint a civilian complaint review board. Pursuant to these provisions, the Commissioner issued General Order No. 14 on May 2, 1966, amended on May 17, 1966, which established a complaint review board comprised both of civilians and members of the police force. The question of the validit y of the Commissioner's power to issue such an order has already been determined by the New York State Supreme Court. See Cassese v. Lindsay, New York Law Journal, June 24, 1966,page 12. There the Court refused to enjoin the Police Commissioner from establishing the review board as he saw fit, upholding the power of the Police Commissioner to issue General Order No. 14. Justice Murphy in his opinion noted specifically"..the right of the agency chief to control and administer his department .... It is not the province of any individual, or organization, or indeed , the Court, to dictate to an appointed public official how he may best command his department". Cassese v. Lindsay, Ibid. In another recent New York decision involving referendum issues, the Court warned that "a transparent attempt to formulate a ... referendum on some technical basis will not suffice, if in fact the attempt is really to avoid governmental responsibility and' shift the burden of decision to a public poll." See Kupferman v. Katz, supra, at 774. In other words, the Courts have expressed a strong reluctance to permit referenda to interfere with legally authorized administrative acts.

> "It is quite generally held in this country that the power to initiate legislation under statutes providing for the initiative and referendum in the conduct of municipal affairs does not extend to such functions of city government as purely administrative in character." People v. Kapp, 189 N.E. 920.

The tendency to protect administrative decisions from review by referendum and initiative action stems from a concern that a minority of peole may seek to use such devices deliberately to interfere with and delay the orderly performance of governmental functions by the proper authorities. Lynch v. O'Leary, supra, at 593.

" To allow laws dealing with referendum in the conduct of municipal affairs to be invoked to annul or delay executive or administrative action tends to delay and in some cases to annul the prompt and efficient administration of city affairs ." Read v. Scottsbluff, 139 Neb. 418,297 N.W. 669 (1941).

In other words, referenda and initiative were never intended as devices to inquire into and review acts reflecting the expertise and experience of administrative officials where such acts are necessary to the effective and continuing function of their departments. In fact, the Court of

Appeals in Astwood v. Cohen, supra, adopted precisely that test in ruling that administrative decisions by public officials and agencies cannot be routinely subjected by public referendum. The decisive factor was whether the administrative act in controversy could be performed without legislative approval:

> Administrative action which may be taken without legislative authority or approval was not intended to be taken by direct action of the voters.... The tradition of representative, democratic government is too strong to permit an inference that the legislature intended to extend the exceptional process of direct legislation to details of administration unrelated to amendments of the Charter, whether regulated by local laws and ordinances or managed by responsible administrative agencies. Matter of Astwood v. Cohen, supra at 491.

The Police Commissioner's General Order No. 14 was not subject to legislative approval and was validly issued without it. This we know from the decision of the New York Supreme Court in Cassese v. Lindsay, supra.

The present proposal of the petitioners to bring the matter of the civilian complaint review board before the electorate clearly constitutes an attempt to interfere with and override the duly constituted power of the Police Commissioner to control, the administration and discipline of the department. Therefore initiative action on this matter is unlawful.

POINT VI

THE CITY CLERK WAS OBLIGATED TO CERTIFY THAT THE PETITIONS FAILS TO COMPLY WITH THE REQUIREMENTS OF LAW

Section 37 of the Municipal Home Rule Law, under which the proposed amendment has been filed, requires the City Clerk to issue a "certificate that the petition complies or does not comply with all the requirements of law..." City Clerks have previously acted pursuant to this provision by certifying the petitions filed with them were legally insufficient as a matter of law. For example, Lynch v. O'Leary , supra; Noonan v O'Leary, supra.

In view of the legal insufficiencies of the proposed law and pursuant to the authority vested in him by Section 37 of the Municipal Home Rule Law, the City Clerk certified that the petitions at issue herein do not comply with the requirements of law.

CONCLUSION

WHEREFORE, it is respectfully submitted that the order requested by petitioner declaring the petitions filed with the Clerk of the City of New York to be valid and directing the City Clerk to transmit his certificate that the petitions comply with the requirements of law to the Council of the City of New York, be denied.

Dated: New York, New York
August 9, 1966

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THE SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

In the Matter of the Application of

AMELIA CASSESE,
Respondent-Petitioner,

- vs -

HERMAN KATZ, as City Clerk of the
City of New York,
Appellant-Respondent.

Purs. to Sec. 37, MHRL & Art. 78, CPLR

Case No.:

Cal. No.:
887
(Aug. 18, 1966)

BRIEF OF AMICI CURIAE

The Amici Curiae, JOHN and MARJORIE LAWRENCE, submit the within typewritten brief on the appeal in the above entitled matter, to show points of law upon the undisputed fact or admitted issues. what points they believe are decisive of the case. The Amici Curiae seek leave to show these matters because they are of vital personal concern to the Amici, as they are of similar moment to all electors, citizens, inhabitants and property owner within the City of New York,

Three points are shown on this brief:

1. That City Clerk had, and has, no legal authority or jurisdiction, under color of any duties imposed on him by Sec. 37, M.H.R.L., to make any judicial class of determination respecting any initiative petition laid befor him.

2. That no person is entitled in any Sec. 37, MHRL special proceeding to question or determine the subject matter validity of any local law set out on any initiative petition provided for therein, nor in any other class of special or law proceeding until there is material reasonable certainty that real waste, loss or injury is about to be, or is being, effected by

placement of an inherently illegal proposition on the ballot.

3. That the advisory opinion of the Court below, that the rule in ASTWOOD V. COHEN has been overruled by the subsequent local government home rule provisions in general statute and the State Constitution, empowering local governments at will to supersede all special acts of the Legislature, is correct.

Argument

Notwithstanding the irregularities, and defects in the proceedings and papers in the Court below, this Court ought to, because of great public concern about the matters involved in the above entitled proceeding, overlook such irregularities and defects, ought not dismiss the appeal or remand the matter for further proceedings, but should review the matters decided in the actual and advisory decision of the Court below.

Point One

CITY CLERK KATZ WAS NOT DELEGATED ANY JUDICIAL FUNCTION THROUGH THE DUTIES IMPOSED ON HIM BY SECS. 47 (5) and (6), M.H.R.L.

At paragraph "I" of the exhibit annexed to the Answer of Appellant-Respondent KATZ, he purports a judicial class of determination. In the opinion below, the learned judge shows that nothing in the language of Sec. 37, M.H.R.L., or the requirements for one to hold the office of City Clerk, indicates the City Clerk is vested with judicial functions.

The language of Sec. 37(5) and (6), M.H.R.L. clearly shows that no power to adjudicate law issues, respecting matters stated on initiatiave petitions, is vested in the City Clerk. These MHRL provisions directly specify that the clerk is solely directed to allege his "findings" in his ceritificate. "Findings" go to ascertainment of facts, and do not comprehend the making of "conclusions of law".

Nowhere in Sec. 37, M.H.R.L. is it indicated that the City Clerk is empowered to hold any judicial class of hearing. Yet, if it be said that he is delegated judicial functions, by reason of the Due Process clause of the Constitution, he would have to hold hearing, on due notice give to affected persons, before he could make any judicial determination. STUART V. PALMER, 74 N.Y. 183; BENDER V. UNIV. OF STATE OF NEW YORK, 262 APP. DIV. 627; HECHT V. MONAGHAN, 307 N. Y. 461, 469-470. The language of Sec. 37, M.H.R.L., read in conjunction with Sec. 24, M.H.R.L., specified in reference in Sec. 37, shows that the Leglisture intended to preclude the City Clerk from holding any judicial hearings, and reserved any such hearings to the Supreme Court, and thereby, necessarily, precludes the City Clerk from making any judicial class of determination under Sec. 37.

Point Two

QUESTIONS CONCERNING THE SUBJECT MATTER VALIDITY OF A LOCAL LAW PROPOSED BY AN INITIATIVE PETITION ARE UNRIPE AT THE TIME ALLOWED TO COMMENCE ANY SEC. 37, M.H.R.L. PROCEEDING, AND DO NOT REACH THE SUBSTANTIALITY OF JUSTICIABLE CONTROVERSY UNDER ANY CAUSE OF PROCEEDING UNTIL THE LOCAL LAW IS ABOUT TO BE PLACED ON A BALLOT.

Courts do not exist for the determination of academic, except where indispensable, or such are given ancillary to regular determination where the interests of justice so require. At any time an initiative matter is pending before a City Clerk, under Sec. 37, M.H.R.L., except where the local legislative body has duly voted to refer the matter to the electorat, there is no substantial likelihood, or reasonable certainty, that the proposed local law, if actually inherently invalid shall occasion any loss, waste or injury to any person, be he the municipal corporation, a taxpayer, an elector, or any property owner or inhabitant of a locality about to be affectected thereby. Thus, until the City Clerk is about to certify an initiative or intiative-referendum matter to election officials for placement upon a a ballot, no person is aggrieved, or reasonably about to be aggrieved, by the substance of the proposed law, and matters concerning the proposed law's inherent validity are merely academic, and controversy thereon is not justiciable.

Point Three

THE COURT BELOW DID NOT ABUSE ITS DISCRETION IN RENDERING AN ADVISORY OPINION RESPECTING THE RULE IN ASTWOOD V. COHEN, AND SUCH ADVISORY OPINION, IN THE PUBLIC INTEREST, OUGHT TO TO BE AFFIRMED

Having expressly and solely actually determined that City Clerk Katz did not possess any implied power to make a judicial class of determination about the subject matter validity of the local law proposed on the Cassese initiative opinion, (see first nine pages of the decision of J. Saypol, as printed in the appendix to the brief of Respondent-Appellant Katz,) the Court below, on the tenth page of such opinion, in the bare last 18 lines thereof, gave an advisory opinion about the Astwood case matter. The court below stated that:

> "the nature of the problem as a matter of public interest compels a decision by the Court on the question of whether or not the city clerk is correct in his judgment that, paraphrasing, a change of this kind,(as proposed in the local law advanced by petitioner Cassese,) is not an (Charter) amendment within the meaning of the Astwood case. . . "

The interests of justice, in preventing needless litigation will be served by this Court giving affirmance advisorily to the advisory opinion stated below.

The determination in the Astwood case, if it ever was sound, no longer has any possible validity. Astwood declared, upon a review of the subject matters of laws codified in the City Charter, on the one hand, and in the Administrative Code, on the other hand, as both of such codified bodies of laws were originally enacted by the State Legislature, that the Legislature intended the City Charter should be limited to such laws as were in the nature of being broad general grants of local government powers, whereas the Administrative Code was intended to be a codification of detailed matters of local government, so tha the Charter was analogous to constitutions, and the Administrative Code was analogous to coded statutes. The Court of Appeals, by judicial notice, having Bound this intendment in the handiwork of the Legislature, such a finding of fact is binding upon this Court.

But where it is manifest that the Legislature solely alleged this intendment impliedly in a special statute, i.e., in a statutes solely applying to the City of New York, it is plain that such intendment can in any way now bind the local government. By the provisions of Sec. 10(1)(i), Municipal Home Rule Law, and of Article IX, Sec. 2(c)(i), State Constitution, the local government is given absolute and plenary power to supersede any special statute matter declared by the Legislature pertaining to it. How a locality shall codify its local laws, in the absence of a general statute so commanding it, is inherently solely a matter of local concern. The Legislature's intendment, then, as allegedly impliedly found by the Court of Appeals in Astwood, must give way to any alternative choice by the local government. And an implied specially ~~amendment~~ enacted intendment of the Legislatue can be superseded by an impliedly intended amendatory act by the local governing unit.

Upon the foregoing points and authorities, undersigned Amici Curiae respectfull request this Court to affirm the result of the Court below, and to declare that any clerk directed to consider any initiative petition under Sec. 37, M.H.R.L. is confined solely to ministerial fact scrutiny and finding thereon in the inscribing of his certification to a common council; that questions concerning the validity of the subject matter of any local law proposed by way of initiative petition are not congnizable by any special proceeding provided by Sec. 37, M.H.R.L., nor justiciable under any cause of proceeding until there is reasonable certainty the matter is about to be placed on a ballot, and that the rule stated in Astwodd v. Cohen is no longer enforceable by reason of the provision of Article IX, Sec. 2(c)(1), State Constution, empowering the locality to override any special statute of the Legislature, or any local law by a Cjarter ~~ammdment~~.

Respectfully submitted,

/ss/

Dated: August 17, 1966

JOHN M. LAWRENCE, Pro Pers.

MARJORI F. LAWRENCE, Pro Pers.

COURT OF APPEALS
OF THE STATE OF NEW YORK

....

IN THE MATTER OF THE APPLICATION OF

AMELIA CASSESE,

Petitioner-Respondent,

- against -

HERMAN KATZ,
Clerk of the City of New York,

Respondent-Appellant.

....

....

IN THE MATTER OF THE APPLICATION OF

MARIA MONPLAISIR, MICHAEL J. YORK
and LARS EKWURZEL,

Petitioners-Respondents,

- against -

HERMAN KATZ,
Clerk of the City of New York,

Respondent-Appellant.

....

BRIEF OF AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF BNAI BRITH, CATHOLIC INTERRACIAL COUNCIL, CORE, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NEW YORK CIVIL LIBERTIES UNION, OFFICE OF CHURCH AND RACE OF THE PROTESTANT COUNCIL OF NEW YORK, SCHOLARSHIP, EDUCATION, AND DEFENSE FUND FOR RACIAL EQUALITY, AND URBAN LEAGUE OF GREATER NEW YORK AS AMICI CURIAE.

Carl Rachlin,
Stephen M. Nagler,

of Counsel.

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STATEMENT OF AMICI

In view of the importance of this case, the American Jewish Committee, American Jewish Congress, Anti-Defamation League of B'nai Brith, Catholic Interracial Council, CORE, National Association for the Advancement of Colored People, New York Civil Liberties Union, Office of Church and Race of the Protestant Council of New York City, Scholarship, Education and Defense Fund for Racial Equality on behalf of the Congress of Racial Equality, and the Urban League of Greater New York, all concerned with the civil rights of citizens and with the maintenance of civilian control of the Police Department of the City of New York submit the following brief urging the reversal of the order of the Appellate Division, First Department, affirming the order of Hon. Irving Saypol, Justice of the Supreme Court of the State of New York, First Department, which directed the respondent-appellant to certify that the petitions submitted to him comply with all the requirements of law.

The facts are accurately and objectively summarized in the extensive Statement of Facts presented in the Respondent's Memorandum in Opposition.

POINT I.

Neither Petition Proposes an Amendment to The Charter of the City of New York and is Therefore Unauthorized by Section 37 of the Municipal Home Rule Law of New York State

Section 37 of the Municipal Home Rule Law provides for the adoption by initiative of amendments to the City Charter. As emphasized by the New York Courts, the proposed local law must in fact be a charter amendment, as distinguished from other local laws, ordinances, administrative regulations and resolutions which differ in form as well as content from charter provisions.

> "The City Home Rule Law delegates no power to the people to initiate or adopt by popular vote amendments to city ordinances, resolutions or local laws other than those amending a city charter." Noonan v. O'Leary, 132 N.Y.S. 2d 726 (1954) at 728.
>
> "Section 19-a (predecessor to Section 37 of the Municipal Home Rule Law) restricts the use of initiative and referendum to charter amendments as distinguished from local laws which are enacted in ordinary course by the legislative body in regulation of the City's affairs without legislative amendment of the charter. Even more clearly, administrative action, which may be taken without legislative authority or approval was not intended to be taken by direct action of the voters. The test of validity in every case is whether the local law is in truth and in fact an amendment of a city charter." Matter of Astwood v. Cohen, 291 N.Y. at 490, 53 N.E. 2d at 360 (1944).

A. The Proposals are Inappropriate as Amendments to a Short Form Charter

Authorized by the State Legislature (L. 1936, ch. 438; L. 1937, ch. 929), the New York City Charter is a "short form" charter. This form of charter was proposed by the 1936 Charter Revision Commission, which envisioned it as "the fundamental plan of the city government ..." and the "general principles which are to govern its operation ...." (Report of the New York City Charter Revision Commission, 1936, at 7). Supplemented by the Administrative Code which is designed for the regulation of numerous details and the guidance of the departments, Id. at 7, the report of the 1936 Constitutional Convention Committee makes it clear that the charter was intended only to

> ....outline in skeleton form the agencies of the city government and their basic functions. It does not purport to embody all of the provisions of law relating to the government of the city. It provides the structural framework of the city government and is intended to set forth the organic law relating to the city. It was intended that the details of administration be included in an administrative code. Such a code was to enact all provisions of law affecting the city which were consistent with the provisions of law of the new charter.
>
> An analogy might be drawn in describing the relationship between the Administrative Code and the Charter as on a par with the relationship between the statutory law and constitution of a sovereign body, wherein those provisions which were intended to be flexible and yield to changing conditions would be subject to easy amendment, while primary grants of power would be contained in a body of law which would express fundamental principles and ideals of government." New York State Constitutional Revision Committee Report, 1936, Volume 5, p. 5-6.

Commenting on administrative agencies, the New York City Charter Revision Commission of 1936 further noted:

> "In its short charter the commission has indicated only the essentials of the organization of each department and, in as general language as possible, its essential powers, leaving to the code the large amount of administrative detail which is contained in the existing charter and other law." (Supra at 33)

In accordance with this purpose, Section 434(a) of the Charter, under which the Police Commissioner derives his general authority to act, (including the authority to establish a civilian complaint review board) states:

> "The Commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department and of the police force of the department."

The Administrative Code, Section 434, has numerous subdivisions spelling out in detail the various specific powers of the Police Commissioner encompassed within the general power set forth in Section 434 of the City Charter.

In sharp contrast to the New York City Charter, most New York municipal charters, however, are "long form", defining and delineating in detail the scope of permissible official action and administrative conduct. Such long form charters may be appropriate for smaller communities but not for a metropolis like New York where the complications of living explain the legislative authorization for a separation of the Charter from the Code.

An attempt by the Patrolmen's Benevolent Association (hereinafter referred to as the P.B.A.) to offer a proposal similar to those presently at issue as an amendment to the New York City Charter was rejected by this Court in Matter of Astwood v. Cohen, supra. On that occasion, the P.B.A. proposed a local law by initiative providing for a salary bonus to policemen and firemen. Dressed in the guise of an amendment to the City Charter, the proposed bonus purported to be in accordance with the predecessor of Section 37 of the Municipal Home Rule Law, Section 19-a of the City Home Rule Law.

An action in the nature of mandamus under Article 78 of the Civil Practice Act to compel the Board of Elections to disregard the P.B.A.'s petition and omit the proposed law from the ballot was brought. Despite the claim by the P.B.A. that the law proposed by the petition was an amendment to the charter, the Court of Appeals stated:

> Even though sections of the Municipal Home Rule Law should be construed liberally according to Section 31 - (Note, now Section 351) liberal construction may now, however, ignore the legislative mandate that only amendments to the charter, as distinguished from other laws, may be enacted by the process of initiative and referendum." Id at 488.

Noting further that the specificity of the proposed law made it an inappropriate amendment to the short form charter of New York City, this Court added:

> "The facts which control will be found in the nature of the proposed law and its relation to the provisions of a particular city charter." Id. at 488.

This procedure has been followed in later cases.

In Matter of Warden, 275 App. Div. 1000, aff'd 300 N.Y. 39 (1949), a petition to alter the Newburgh city charter by initiative to provide for minimum annual salaries for policemen was offered. Objections to the form, sufficiency and validity of that petition, filed in the Supreme Court, were dismissed on the merits. Holding the law proposed by the petitions to be an appropriate charter amendment, the Court of Appeals noted that the long form charter of Newburgh (unlike New York City) had an administrative code built into it and minimum salaries were obviously an appropriate part of an administrative code.

But the short form charter of New York City and the Astwood decision, supra, were specifically distinguished:

> "...In that city (New York) however, the salaries of the policement and firemen were then and are now fixed by

> an administrative code and not by any charter provision. In the Astwood case ... this court in 1943 held the chief question to be whether the proposed law is in truth an amendment of the charter or is so far unrelated to the Charter as to be an amendment in name only ... In applying the statutory test to the proposed law, we must relate the law to the short form charter of the City of New York and determine whether the law is in truth an amendment of the Charter or is merely labeled as such." Under that test, this court in Astwood rejected the local law in question.
>
> "But the Charter of the City of Newburgh is no mere skeleton or framework of governmental structure like the charter of the city of New York. The Newburgh Charter contains many provisions in respect of such matters as assessments and local taxes ... and the organization and regulation of the fire and police departments. Furthermore the City of Newburgh has no administrative code such as was enacted to harmonize with the short form charter of the City of New York. In a word, the Astwood case affords no solution to the issue presented." Id. at 42.

In municipalities functioning under long form charters, a proposed local law on procedures for handling civilian complaints against the police might indeed be an appropriate amendment to the city charter because the charter and the Code are one document. But as an amendment to the Charter of New York City which is a concise statement embodying broadly phrased grants of power and general principles, it is inappropriate. Nothing in Warden, supra, is to the contrary. Specifically this Court made clear that the ruling in Astwood, supra was not overruled, as the majority below recognized. Thus the distinction remains between petitions proposing Charter amendments and those which merely seek to amend the Administrative Code.

IB

The Proposed Local Law would be Appropriate Only as an Amendment to the Administrative Code

Although drawn in the guise of charter amendments the proposed local laws would, in fact, only be appropriate as amendments to the Administrative Code. This is precisely the characterization given a proposed local law too detailed to be an appropriate charter amendment by the Court of Appeals in Astwood (Id. at 489).

> "The proposed local law in fact amends nothing in the charter and the provisions of law which are amended are found in the Administrative Code."

Unlike the Charter, where no mention of procedure for discipline within the Police Department is set forth, the Administrative Code devotes an entire detailed section to this subject, viz., Section 434a-14.0, New York City Administrative Code. In fact, subsection (b) of the existing Section a.H.0434a-14.0 of the Code includes language virtually identical to that of subsection (e) of the proposed local law in the Cassese petition. Both are set forth below.

Proposed Section 440(e)

Prosecution: Right to Hearing:

(Cassese Petition) Notwithstanding anything contained to the contrary, this section shall not be construed to prevent investigation, or prosecution of members of the Police Department for violations of law by a duly constituted court having jurisdiction, a grand jury, district attorney, or other law enforcement agency; nor shall this section be construed to permit a member of the Police Department to be fined, reprimanded, removed, suspended or dismissed, except upon written charges, after such charges have been examined, heard, investigated by the Commis-

> sioner, one of his deputies, or the assistant to the Commissioner.

Existing Administrative Code Provision

> Subsection (b) of Section 434a-14.0 of the New York Administrative Code:
>
> (b) Members of the force, except as elsewhere provided herein, shall be fined, reprimanded, removed, suspended or dismissed from the force only on written charges made or preferred against them after such charges have been examined, heard and investigated by the Commissioner, one of his deputies or the assistant to the Commissioner, upon such reasonable notice to the member or members charged, and in such manner or procedure, practice, examination and investigation as such Commissioner may, by rules and regulations, from time to time prescribe.
>
> (Subd. (b) as amended by L.L. 1955, No. 30, May 6.)

Provisions such as that proposed by petitioners are precisely the "questions of administrative detail" envisioned by the New York City Charter Revision Committee of 1936 properly included within the scope of the Administrative Code. See Report of the New York City Charter Revision Commission of 1936, page 41. No statutory authority for amending the Administrative Code by initiative action exists.

> "...the Administrative Code...was enacted by the legislature and...may only be amended as provided by Section 39 of the City Charter or by the Legislature itself." Astwood, supra at 490.

That the proposals of petitioners "are related" to the charter may be true, as the majority below state, but we urge this misconceives the statute. Everything in the Code is "related" to the Charter; but the true test is whether the proposal is of such a nature as to be included in the Charter, or in the Code. These petitions refer to matters properly in the Code. To include them in the Charter is to nullify the work of the Legislature in creating two separate documents, for then matters relating to the Code will be in the Charter. Thus administrative matters will be in both documents which is hardly what the Legislature intended.

POINT II

Under the Present Home Rule Law the Astwood Doctrine is Still Controlling

The decision in Astwood that administrative matters are inappropriate as amendments to a short form charter has lost none of its force. Changed twice since the Astwood case (See Appendix) the Home Rule Law, in so far as the present proceeding is concerned, is intact. The law in effect at the time of the Astwood decision read in part:

> City Home Rule Law, Section 19-a-Provisions for Adoption of Amendment
>
> "A local law amending a city charter may also be adopted in the following manner ..." (L. 1939 Ch. 867).

No definition of a charter amendment was included in the statute at that time.

In 1940, petitions proposing the wholesale amendment of the City Charter of Johnstown, New York, under Section 19-a of the City Home Rule Law were dismissed by the Appellate Division (Third Department) on the grounds that the petitions did not present an amendment contemplated within Section 19-a, but instead proposed an entirely new charter. Maylender v. Morrison, 200 App. Div. 892, 22 N.Y.S. 2d 555, aff'd 284 N.Y. 575, 29 N.E. 2d 395 (1940).

Specifically overruling this decision, the legislature amended Section 19-a to read:

> "A local law amending a city charter, however extensively may also be adopted in the following manner..." (L. 1944 Ch. 602).

At the same time a definition of "charter amendment" was added. Article

I, Section 2 of the City Home Rule Law was augmented by subsection 5 stating:

> The term "charter amendment" means any change in an existing charter presented as such under authority of this chapter or any chapter or state statute. A charter amendment may be of any extent and deal with any number of subjects. A proposal presented as a charter amendment shall not be rejected as such on the ground that it constitutes a new charter. (L. 1944 Ch. 602).

That these changes were not intended to overrule Astwood is clear from the fact that they were proposed before a decision in Astwood was handed down.

But the problem did not end with these amendments. In Application of Grenfell, 185 Misc. 558, 57 N.Y.S. 2d 284 (1945), the Court again struck down an initiative proposing an entirely new charter for the City of Schenectady.

Reacting to this decision in a 1957 legislative note we read:

> The addition of a new charter to the scope of this section is not an extension of the intended coverage of the section but a clarification to avoid unintended limitations by Court decision ... In 1940 a proposed extensive revision of a city charter presented in amendment form was thrown out by the courts as in fact not an amendment but a new charter. (Maylender v. Morrison, 1940, 200 App. Div. 892, 22 N.Y.S. 2d 555, aff'd 248 N.Y. 575, 29 N.E. 2d 395). In 1944, the legislature sought to overcome this decision by inserting the words 'however extensively' after 'amending a city charter' and some extensive charter revisions have been adopted under the provisions of the section since that time. However in 1945, a court held that this amendment left unchanged the distinction between the adoption of a new charter and adoption of amendments, though amendments may be extensive as well as numerous. (Application of Grenfell, 1945, 185 Misc. 558, 57 N.Y.S. 2d 284) ..." (1957 Sessions Law of New York, at 2186).

Nowhere is there expressed an intent to reverse by legislation the ruling in Astwood. To emphasize further its intent, the legislature again amended the Home Rule Law in 1963. Section 19-a was changed to read:

> "A local law amending a city charter (however extensively) or providing a new city charter, also may be adopted in accordance with the provisions of this section..." (L. 1963, Ch. 843).

The definition of "charter amendment" in Article I, Section 2 was amended to read:

> "The term 'charter amendment' means a new charter or any change in an existing charter presented as such under authority of this chapter ..." (L. 1963, Ch. 843).

The City Home Rule Law was repealed and superceded by the Municipal Home Rule Law in 1964. Section 19-a became Section 37, which is presently in effect.

Behind the legislative changes in the Home Rule Law since the Astwood case, was an intent to permit the adoption of entirely new charters or substantial parts of charters such as would be necessary to establish new departments or merge old ones to meet current problems. But there is no evidence of a desire to abolish the distinction between an amendment to the Charter and an amendment to the Code.

In short, the phrase "however extensively" and the other language in the present statute was meant to allow any number of changes in a charter at one referendum. It was not intended to allow the incorporation of detailed provisions not appropriate to short form charters. To allow the addition of such detail would be to undermine the work started by the 1936 Charter Revision Commission and carried on by the 1961 Charter Revision Commission. It would destroy their conception of the short form charter, allowing some administrative details to be placed in the charter, while others are found in the Administrative Code, thus creating a situation unjustified by either the legislative history or the decisions of this Court.

The Astwood doctrine remains unaffected by the legislative action of the past twenty years. A proposal for salary bonuses, as in Astwood, the placement of traffic lights or other detailed matter are still inappropriate to a short form charter. Astwood is as valid today as it was in 1944. The local laws presently at issue would have been inappropriate amendments in 1944, just as they are today.

POINT III

The Power to Initiate Legislation Should Not Extend to Purely Administrative Practices

Under the general provisions of Section 434a of the City Charter of New York, supra, and the more specific provisions of Section 434a-14.0 of the Administrative Code, supra, the Police Commissioner is empowered to appoint a civilian complaint review board. Pursuant to these provisions, the Commissioner issued General Order No. 14 on May 2, 1966, amended on May 17, 1966, which established a complaint review board both of civilians and members of the police force. The question of the validity of the Commissioner's power to issue this order has already been determined by the New York State Supreme Court. In Cassese v. Lindsay, (New York Law Journal, June 24, 1966, p. 12) the Court refused to enjoin the Police Commissioner from establishing the review board, upholding the power of the Police Commissioner to issue General Order No. 14. Justice Murphy in his opinion noted specifically the "...right of the agency chief to control and administer his department ... It is not the province of any individual, or organization, or indeed, the Court, to dictate to an appointed public official how he may best command his department." (Cassese v. Lindsay, Ibid.)

In another recent New York decision involving referenda the Court warned that "a transparent attempt to formulate a ... referendum on some technical basis will not suffice, if in fact the attempt is really to avoid government responsibility and shift the burden of decision to a public poll." See Kupferman v. Katz, supra, at 774. In other words, the Courts have expressed a strong reluctance to permit referenda to interfere with legally authorized administrative acts.

> It is quite generally held in this country that the power to initiate legislation under statutes providing for the initiative and referendum in the conduct of municipal affairs does not extend to such functions of city government as are purely administrative in character. (People v. Kapp, 355 Ill. 596; 189 N.E. 920 (1934).

The tendency to protect administrative decisions from review by referendum and initiative action stems in part from a concern that such devices may interfere with and delay the orderly performance of government functions by proper authorities.

> To allow laws dealing with referendum in the conduct of municipal affairs to be invoked to annul or delay executive or administrative action tends to delay and in some cases to annul the prompt and efficient administration of city affairs. Read v. Scottsbluff, 139 Neb. 418; 297 N.W. 669 (1941).

In other words, referendum and initiative were never intended as devices to inquire into and review acts reflecting the expertise and experience of administrative officials where such acts are necessary to the effective and continuing functioning of their departments. This was clearly the feeling of the New York City Charter Revision Commission when it considered the incorporation of a provision for initiative action into the City Charter itself:

> This initiative is broad enough to admit of the submission to the people of broad questions of principle in relation to the frame of government such as may appropriately be submitted to popular vote; but it was not thought wise to permit initiation of questions of administrative detail that can more deliberately and effectively be dealt with by a legislative body. Report of New York City Charter Revision Commission, supra, at 41.

In fact, the Court of Appeals, in Astwood v. Cohen, supra, adopted precisely that test in ruling that administrative decisions by public officials and agencies cannot be routinely subjected to public referendum. The decisive factor was whether the administrative act in controversy could be performed without legislative approval:

> Administrative action which may be taken without legislative authority or approval was not intended to be taken by direct action of the voters ... The tradition of representative, democratic government is too strong to permit an inference that the legislature intended to extend the exceptional process of direct legislation to details of administration unrelated to amendments of the Charter, whether regulated by local laws and ordinances or managed by responsible administrative agencies. Matter of Astwood v. Cohen, supra, at 491.

The Police Commissioner's General Order No. 14 was not subject to legislative approval and was validly issued without it. Cassese v. Lindsay, supra.

It cannot be doubted that the present proposal of the petitioners to bring the matter of a civilian complaint review board before the electorate clearly constitutes an attempt to affect and limit the duly constituted power of the Police Commissioner to control the administration and discipline of the department, all of which are derived from the Code.

CONCLUSION

WHEREFORE, it is respectfully submitted that the affirmance by the Appellate Division, First Department of the order of the Supreme Court of New York County be reversed.

Dated: New York, New York
August 31, 1966

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APEENDIX 1

Changes in the Definition of "Charter Amendment"

Laws 1924, Chapter 363	Laws 1944, Chapter 602	Laws 1963, Chapter 843
The City Home Rule Law was enacted pursuant to section XII (now article IX) of the State Constitution. No definition of Charter Amendment was included.	Article 1, section 2, "Definition" of the City Home Rule Law was augmented by subsection (5): "the term charter 'amendment' means any change in an existing charter presented as such under authority of this chapter or any chapter or state statute. A charter amendment may be of any extent and may deal with any number of subjects. A proposal presented as a charter amendment shall not be rejected as such on the ground that it constitutes a new charter.	The Municipal House Rule was enacted and the City House Rule Law repealed. The sub-section on Charter 'amendment' of Article 1, section 2, was changed to subsection (2): "the term 'charter amendment' meant a new charter or any change in any existing charter presented as such under authroity of this chapter or any state statute or charter.

Changes in the Provision for Adoption of Charter Amendments

Laws 1924, Chapter 363	Laws 1939, Chapter 867	Laws 1944 Chapter 602	Laws 1963, Chapter 843 The Municipa
The City Home Rule Law was enacted pursuant to section XII (now Article IX) of the State Constitution. No provision for adoption of Charter Amendments was included.	The City Home Rule Law was augmented by "Section 19a-Provisions for adoption of amendments. A local law amending a city charter may also be adopted in the following manner..."	Section 19a of the City Home Rule Law was changed to read "A local law amending a city charter however, extensively, also may be adopted in the following manner: (underlining indicating new material was added)	The Municipal Home Rule Law was enacted and the City Home Rule Law was repealed. Section 19-a became section 37 of the Municipal Home Rule Law reading: "a local law amending a city charter (however extensively) or providing a new city charter, also may be adopted in accordance with the provisions of this section."

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

IN THE MATTER OF THE APPLICATION OF

AMELIA CASSESE,

Petitioner,

-against-

HERMAN KATZ,
Clerk of the City of New York,

Respondent.

BRIEF OF AMERICAN JEWISH COMMITTEE; AMERICAN JEWISH CONGRESS; CATHOLIC INTERRACIAL COUNCIL; CONGRESS OF RACIAL EQUALITY; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; NEW YORK CIVIL LIBERTIES UNION; SCHOLARSHIP, EDUCATION, & DEFENSE FUND FOR RACIAL EQUALITY; AND URBAN LEAGUE OF GREATER NEW YORK AS AMICI CURIAE.

SUMMARY OF ARGUMENT

POINT I.	HISTORICALLY THE SCOPE OF INITIATIVE AND REFERENDUM HAS BEEN LIMITED TO REMEDYING LEGISLATIVE ABUSES.
POINT II.	THE PROPOSED LOCAL LAW DOES NOT IN FACT CONSTITUTE A CHARTER AMENDMENT AND IS THEREFORE UNAUTHORIZED BY SECTION 37 OF THE MUNICIPAL HOME RULE LAW OF NEW YORK STATE.
POINT III.	THE PROPOSED LOCAL LAW WOULD IN FACT ONLY BE APPROPRIATE AS AN AMENDMENT TO THE ADMINISTRATIVE CODE.
POINT IV.	THE POWER TO INITIATE LEGISLATION SHOULD NOT EXTEND TO PURELY ADMINISTRATIVE FUNCTIONS.
POINT V.	THE CITY CLERK WAS OBLIGATED TO CERTIFY THAT THE PETITIONS FAIL TO COMPLY WITH THE REQUIREMENTS OF LAW.

STATEMENT OF THE CASE

On July 7, 1966, petitions were filed in the office of the Clerk of the City of New York by the Patrolmen's Benevolent Association (hereinafter referred to as the P.B.A.) pursuant to Section 37 of the Municipal Home Rule Law of the State of New York. The petitions proposed the adoption of a local law to require that all members of any review board established to investigate and process civilian complaints against policemen be full-time members of the Police Department of the City of New York, thereby removing from the Mayor of New York City any authority to investigate police practices and procedure, and prohibiting establishment of a review board comprised in whole or in part of civilian members.

Section 37 of the Municipal Home Rule Law requires that the City Clerk "... issue a certificate that the petition complies with or does not comply with the requirements of law." Pursuant to this requirement, on August 5, 1966, Herman Katz, Clerk of the City of New York certified that the petitions failed to meet all the requirements of law.

On July 29, 1966, Amelia Cassese petitioned for an order pursuant to Article 78 of the Civil Practice Law and Rules and Section 37 of the Municipal Home Rule Law declaring valid the petition filed by the Patrolmen's Benevolent Association with the City Clerk and directing the City Clerk to transmit to the Council of the City of New York a certificate that he has examined same and has found that it complies with all the requirements of law.

The American Jewish Committee, The American Jewish Congress, The Catholic Interracial Council, The National Association for the Advancement of Colored People, The New York Civil Liberties Union, The Scholarship, Education and Defense Fund for Racial Equality on behalf of The Congress of Racial Equality, and the Urban League of Greater New York appear in this case as _amici curiae_ for the purpose of showing that the petitions do not comply with the provisions of Section 37 of the Municipal Home Rule Law and, therefore, that the City Clerk acted correctly and according to his duty by certifying that such petitions fail to meet the requirements of law.

POINT I.

HISTORICALLY THE SCOPE OF INITIATIVE AND REFERENDUM HAS BEEN DERIVED TO REMEDYING LEGISLATIVE ABUSES

We believe that in order to understand the nature of iniative and referendum in New York State and New York City, it is important to examine their historical development.*

Initiative and referendum have been and still are considered extraordinary measures. In the United States, they arose specifically as corrective measures to combat abuses of legislative power; that is, to act where the legislature had failed to do its duty.

Eighteenth century constitution-makers, distrusting executive power, made the legislature substantially omnipotent. The electorate was restricted to the single function of choosing representatives and electing officials. When the legislature began to abuse its power, becoming unresponsive to the wishes of the people, constitutional limits were placed upon legislative prerogative and a movement seeking initiative action arose. In 1821, New York became the first state beyond New England borders to submit.its constitution to popular vote, in contrast to earlier constitutions, which had been ratified by convention. By 1840, other states were following suit. Gradually direct action by voters was expanded to include ordinary as well as constitutional legislation. It was recognized, however, that once the people secured the opportunity to adopt their own laws all other difficulties would not vanish. Initiative action was notand could not be a panacea. Provisions for initiative and referendum were utilized by municipalities and states "... not from a popular conviction that they promise a wholly satisfactory method of law-making, but from a widespread impression that only through these agencies can present day legislative abuses be eradicated."[1] (emphasis added).

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* NOTE: Although initiative and referendum are technically distinct procedures, "referendum" meaning approval by the electorate of action previously taken by the legislature and "initiative" meaning direct initiation of legislation without prior action by the legislature, no distinction is made in this brief or the petitions in question.

In short, initiative and referendum were intended to be used restrictively, as a remedy for legislative abuses and not as an unfettered license to register despleasure with the acts of any government official. One authority noted:

> when we consider the vast number of bills passed by the state legislatures and of ordinances and resolutions passed by municipal councils, its immediately becomes evident that no one but a lunitic would propose the submission of all these measures to the people for formal approval, unless he considered most of this legislation unnecessary.[2]

This notion of the restricted scope of initiative and referendum has prevailed to this day. Kupferman v. Katz, 243 NYS 2d 773 (1963); Swanker v. City of Amsterdam, 5 Misc.2d 932, 161 NY2d 932 (1937); Matter of McCabe v. Voorhis, 243 NY 401, (1926); Matter of Warden, 275 A.D. 1000, aff'd 300 NY 39 (1949).

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1. Munro, William B.(ed.), The Initiative, Referendum and Recall, D. Appleton and Co. (NY:1912) p.15
2. Wilcox, Dr. Delos F., Government By All the People, Macmillan (NY:1912) p.132.

Representative democracy as embodied in the system of government established by the Constitution and laws of both the United States and the State of New York includes the idea that laws be enacted by a duly elected legislative assembly and that direct action by the electorate which may disrupt the orderly procedure of government be reserved for exceptional situations, Lynch v. O'Leary, 178 Misc. 567, 2NY 2d 588. Thus

> ... direct legislation in cities must always rest on some constitutional or statutory grant of power. Government by representation is is still the rule. Direct action by the people is the exception. (Matter of McCabe v. Voorhis, supra at 413)

THE PROPOSED LOCAL LAW DOES NOT IN FACT CONSTITUTE A CHARTER AMENDMENT AND IS THEREFORE UNAUTHORIZED BY SECTION 37 OF THE MUNICIPAL HOME RULE LAW OF NEW YORK STATE

The petitioners contend Section 37 of the Municipal Home Rule Law of New Y9rk State furnishes the express statutory authorization necessary for their action. The law they propose however, does not properly fall within the scope of thatsection.

Section 37 provides for the adoption by initiative for amendments to the City Charter. The essential requirement of this section, as emphasized by the New York Courts, is that the proposed local law be in fact a charter amendment, as distinguished from other local laws, ordinances and resolutions which differ in form as well as consent from charter provisions. See Hacker v. Common Council of Ithaca, 49 Misc. 69 (1966); Noonan v. O'Leary, 132 NYS 2d 726 (1954); Matter of Astwood v. Cohen, 291 NY 484 (1944); Maylander v. Morrison, 260 App.Div. 892, aff'd 284 NY 575 (1940).

The New York City Charter is unusual in that it is a "short form" charter. This form of charter was proposed by the 1936 Charter Revision Commission, which envisioned it as " the fundamental plan of the city government... and the general principles which are to govern its operation..." (Report of the New York City Charter Revision Commission, 1936, Id at 7.), to be supplemented by the Administrative Code " for the regulation of numerous details and the guidance of the departments."(Id at 7.)

Commentaries at the time of its creation make it clear that the Charter was intended only to

> ...outline in skeleton form the agencies of the city government and their basic functions. It does not purport to embody all of the provisions of law relating to the government of the city. It provides the structural framework of the city government and is intended to set forth the organic law relating to the city. It was intended that the details of administration be included in an administrative code. Such a code was to enact all provisions of law affecting the city which were consistent with the provisions of law of the new charter.
>
> An analogy might be drawn in describing the relationship between the Administrative Code and the Charter as on a par with the relationship between the statutory law and constitution of a sovereign body, wherein those provisions which were intended to be flexible and yield to changing conditions would be subject to easy amendment, while primary grants of power would be contained in a body of law which would express fundamental principles and ideals of government. (New York State Contitutional Convention Committee Report, 1936, Volume 5, p.5-6).

Thus, Section 434(a) of the charter, under which the police commissioner derives authority to establish a civilian complaint review board, states very generally that

> The Commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department and of the police force of the department.

This is in sharp contrast to the charters of most New York municipalities which are "long form", that is, they define and delineate in detail the scope of permissible official action and administrative conduct.

In the Matter of Wardon, supra, there was an attempt to alter by initiative the Newburgh City Charter to provide for minimum annual salaries for members of the Police Department. The Appellate Division of the Supreme Court

(Second Department) by a divided court upheld the dismissal on the merits of the petition for an order under Section 16 of the City Home Rule Law and Section 335 of the Election Law summarily determining objections to the form, sufficiency, and validity of a petition for the submission to the electors of Newburgh of a proposed charter amendment. In holding the law proposed by the petitions to be an appropriate charter amendment, the court noted that the long form charter in effect included an administrative code within it. The short form charter of New York City and its separate Administrative Code, was specifiilcally distinguished. In municipalities such as Newburgh the proposed local law on procedures for handling civilian complaints against the police might indeed be an appropriate amendment to the city charter. See, for example, Matter of Warden, supra, Hacker v. Common Council, Ithaca, supra; however, it is entirely inappropriate as an amendment to the charter of New YorkCity which is a concise statement embodying broadly phrased grants of power and general principles.

A previous attempt by the Patrolmen's Benevolent Association to characterize a proposal similar to that presently at issue as an amendment to the New York City Charter was rebuffed by the Court of Appeals in Matter of Astwood v. Cohen, 291 N.Y. 484(1944). On that occasion, the P.B.A. proposed a local law by initiative providing for a salary bonus to policemen and firemen, which law purported to be an amendment to the city charter in accordance with the predecessor of Section 37 of the Municipal Home Rule Law, Section 19-A of the City Home Rule Law,

A mandamus action was brought under Article 78 of the Civil Practice Act to compel the Board of Elections to disregard the P.B.A.'s petition and omit the proposed local law from the ballot, on the theory that the law proposed by the petition was not an appropriate amendment to the charter. The Court of Appeals, in affirming the orders of the lower courts granting the mandamus stated,

> Even though sections of the Municipal Home Rule Law should be construed liberally according to Section 31/[Note: Now Section 35]/, liberal construction may not, however, ignore the legislative mandate that only amendments to the charter, as distinguished from other laws, may be enacted by the process of initiative and referendum. (*Id.* at 488)

The decision went on to note that the specificity of the proposed law made it an appropriate amendment to the short form charter of New York City. The law here proposed by the P.B.A. is equally inappropriate as an amendment to the city charter and invalid for precisely the same reasons.

POINT III

THE PROPOSED LOCAL LAW WOULD IN FACT ONLY BE APPROPRIATE AS AN AMENDMENT TO THE ADMINISTRATIVE CODE

Although drawn in the guise of a charter amendment the proposed local law would, in fact, only be appropriate as an amendment to the Administrative Code. This is precisely the characterization given a proposed local law too detailed to be an appropriate charter amendment by the Court of Appeals in Astwood (Id. at 489). Unlike the Charter, which makes no mention of procedure for discipline within the police department, the Administrative Code devotes an entire detailed section to this subject. (Section 434a-14.0, New York City Administrative Code). In fact, Part (E) of this section of the Code includes language virtually identical to that of Section 440a of the proposed local law. (See appendix I.)It is clear therefore that provisions such as that proposed by the P.B.A. are precisely the "questions of administrative detail" envisioned by the New York City Charter Revision Committee of 1936 as properly within the scope of the Administrative Code. See Report of the New York City Charter Revision Commission of 1936, page 41.There is no statutory authority for amending the Administrative Code by initiative Action.

POINT IV

THE POWER TO INITIATE LEGISLATION SHOULD NOT EXTEND TO PURELY ADMINISTRATIVE FUNCTIONS

Under the general provisions of Section 434a of the City Charter of New York, Supra, and the more specific provisions of Section 434a-10.0 of the Administrative Code, supra, the police commissioner is empowered to appoint a civilian complaint review board. Pursuant to these provisions, the commissioner issued General Order No. 14 on May 2, 1966, amended on May 17, 1966, which established a complaint review board comprised both of civilians and members of the police force. The question of the validity of the commissioner's power to issue such an order has already been determined by the New York State Supreme Court. See Cassese v. Lindsay, New York Law Journal, June 24, 1966, page 12. There, the Court refused to enjoin the Police Commissioner from establishing the review board as he saw fit, upholding the power of the police commissioner to issue General Order No. 14. Justice Murphy in his opinion noted specifically the " ... right of the agency chief to control and administer his department .... It is not the province of any individual, or organization, or indeed, the Court, to dictate to an appointed public official how he may best command his department." (Cassese v. Lindsay, Ibid.) In another recent New York decision involving referendum issues the Court warned that " a transparent attempt to formulate a ... referendum on some technical basis will not suffice, if in fact the attempt is really to avoid governmental responsibility and shidt the burden of decision to a public poll." See Kupferman v. Katz, supra, at 774. In other words, the Courts have expressed a strong reluctance to permit referenda to interfere with legally authorized administrative acts.

> It is quite generally held in this country that the power to initiate legislation under statutes provising for the initiative and referendum in the conduct of municipal affairs does not extend to such functions of city government as purely administrative in character. (People v Kapp, 189 NE 920)

The tendency to protect administrative decisions from review by referendum and initiative action stems from a concern that a minority of people may seek to use such devices deliberatly to interfere with and delay the orderly performance of governmental functions by the proper authorities. Lynch v. O'Leary, supra, at 593.

"To allow laws dealing with referendum in the conduct of municipal affairs to be invoked to annul or delay executive or administrative action tends to delay and in some cases to annul the prompt and efficient administration of city affairs." Read v. Scottsbluff, 139 Neb. 418, 297 N.W. 669 (1941).

In other words, referenda and initiative were never intended as devices to inquire into and review acts reflecting the expertise and experience of administrative officials where such acts are necessary to the effective and continuing functioning of their departments. In fact, the Court of Appeals, in

Astwood v. Cohen, *supra*, adopted precisely that test in ruling that administrative decisions by public officials and agencies cannot be routinely subjected to public referendum. The decisive factor was whether the administrative act in controversy could be performed without legislative approval;

> Administrative action which may be taken without legislative authority or approval was mot intended to be taken by direct action of the voters .... The tradition of representative, democratic government is too strong to permit an inference that the legislature intended to extend the exceptional process of direct legislation to details of administration unrelated to a amendments of the Charter, whether regulated by local laws and ordinances or managed by responsible administrative agencies. *Matter of Astwood v. Cohen*, *supra* at 491.

The Police Commissioner's General Order No. 14 was not subject to legislative approval and was validly issued without it. This we know from the decision of the New York Supreme Court in *Cassese v. Lindsay*, *supra*.

The present proposal of the petitioners to bring the matter of a civilian complaint review board before the electorate clearly cobstitues an attempt to interfere[6] with and override the duly constituted power of the police commissioner to control the administration and discipline of the department. Therefore, initiative action on this matter is unlawful.

POINT V:

THE CITY CLERK WAS OBLIGATED TO CERTIFY THAT THE PETITIONS FAIL TO COMPLY WITH THE REQUIREMENTS OF LAW

Section 37 of the Municipal Home Rule Law, under which the proposed amendment has been filed, requires the City Clerk to issue " a certificate that the petition complies or does not comply with all the requirements of law...". City Clerks have previously acted pursuant to this provision by certifying that the petitions filed with them were legally invalid as a matter of law. For example, Lynch v. O'Leary, supra; Noonan v. O'Leary, supra.

In view of the legal deficiencies of the proposed law and pursuant to the authority vested in him by Section 37 of the Municipal Home Rule Law, the City Clerk certified that the petitions at issue herein do not comply with the requirements of law.

APPENDIX

PART (E) of the proposed amendment section 440:

Prosecution: Right to Hearing: Notwithstanding anything conatined to the contrary, this section shall not be construed to prevent investigation, or prosecution of members of the Police Department for violations of law by a duly constituted court having jurisdiction, a grand jury, district attorney, or other law enforcement agency; nor shall this section be construed to permit a member of the Police Department to be fined, reprimanded, removed, suspended or dismissed, except upon written charges, after such charges have been examined, heard, investigated by the Commissioner, one of his deputies, or the assistant to the Commissioner.

PART (B) of section 434a-140 of the New York City Administrative Code under the heading "Discipline of members."

b. Members of the force, except as elsewhere provided herein, shall (be fined, reprimanded, removed, suspended or dismissed) from the force only on (written charges made or preferred against them after such charges have been examined, heard and investigated by the commissioner, one of his deputies or the assistant to the commissioner, upon such reasonable

notice to the member or members charged, and in such manner or procedure, practice, examination and investigation as such commissioner may, by rules and regulations, from time to time prescribe.
(Subd. b as amended by L.L. 1955, No. 30, May 6.)

(38460)

New York Supreme Court

County of New York

Index No. 12215—Year 1966

In the Matter of the Application of

Amelia Cassese,

Petitioner,

against

Herman Katz, as City Clerk of the City of New York,

Respondent,

For an order pursuant to Section 37 of the Municipal Home Rule Law and Article 78 of the Civil Practice Law and Rules.

Index No. 12121—Year 1966

In the Matter of the Application of

Marie E. Monplaisir,
Michael J. Yorke and
Lars Ekwurzel,

Petitioners,

against

Herman Katz, as City Clerk of the City of New York,

Respondent,

For an order pursuant to Section 37 of the Municipal Home Rule Law, declaring valid the petition heretofore filed with the City Clerk of the City of New York and directing the City Clerk to transmit his Certificate that the petition complies with the requirements of law to the Council of the City of New York.

RESPONDENT'S MEMORANDUM IN OPPOSITION

J. Lee Rankin
Corporation Counsel
Attorney for Respondent

Norman Redlich
Pauline K. Berger
Irwin L. Herzog
of Counsel

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New York Supreme Court

County of New York

Index No. 12215—Year 1966

In the Matter of the Application of

AMELIA CASSESE,

Petitioner,

against

HERMAN KATZ, as City Clerk of the City of New York,

Respondent,

r an order pursuant to Section 37 of the Municipal Home Rule
Law and Article 78 of the Civil Practice Law and Rules.

Index No. 12121—Year 1966

In the Matter of the Application of

MARIE E. MONPLAISIR,
MICHAEL J. YORKE and
LARS EKWURZEL,

Petitioners,

against

HERMAN KATZ, as City Clerk of the City of New York,

Respondent,

r an order pursuant to Section 37 of the Municipal Home Rule
w, declaring valid the petition heretofore filed with the City Clerk
the City of New York and directing the City Clerk to transmit
Certificate that the petition complies with the requirements of
to the Council of the City of New York.

RESPONDENT'S MEMORANDUM IN OPPOSITION

Statement

The above-entitled proceedings were instituted under
unicipal Home Rule Law §37. The applicants in each
oceeding are persons who filed a petition with the City

Clerk on July 7, 1966, for submission to the electorate of a proposed local law purporting to amend the New York City Charter in relation to civilian complaint review boards in the New York City Police Department. The applications are for judgment: (a) that the petition contains more than 30,000 valid signatures; (b) directing the City Clerk to transmit to the Council his certificate that the petition satisfies all requirements of law; and (c) for such other further relief as to the Court may deem proper.

The *Monplaisir* application also requests judgment that the proposed local law is a proper subject for submission to the electors at the 1966 General Election.

The proceedings were instituted by the service on July 28, 1966 and July 29, 1966, respectively, of orders to show cause and petitions, returnable August 9, 1966. On the dates of service of the orders and petitions, the 30-day period prescribed by Municipal Home Rule Law §37 for transmission of a certificate by the City Clerk to the City Council had not yet expired. However, on August 5, 1966, the City Clerk transmitted to the City Council his certificate with respect to each Local Law petition, containing a finding, in each case, that the petition failed to comply with the requirements of law, for the reasons hereinafter set forth (*infra,* pp. 4-5).

Issues

1. Is a proposed local law relating to the procedures for reviewing civilian complaints against members of the police force actually an amendment of the New York City Charter within the meaning of Municipal Home Rule Law

§37, and therefore a lawful subject for initiative and referendum under that law—or, is it, in fact, *not* a *charter* amendment within the meaning of §37, but rather an amendment of Adm. Code §434a-14.0 and of General Order No. 14 promulgated by the Police Commissioner to aid him in carrying out his functions under Adm. Code §434a-14.0, and, therefore, not a lawful subject for adoption by initiative and referendum under §37?

2. Did the *Monplaisir* petition have a sufficient number of valid signatures to entitle it to consideration under Municipal Home Rule Law §37?

The Pleadings

Paragraph 7 of each application alleges that the petition for the local law satisfies all requirements of law. The answers deny this allegation and affirmatively allege that the proposed local laws are not, in fact, amendments of the New York City Charter within the meaning of Municipal Home Rule Law §37 and, therefore, may not be adopted by initiative under that law. The answer to the *Monplaisir* application also alleges that the petition does not have a sufficient number of valid signatures to be considered under Municipal Home Rule Law §37.

The answers request judgment denying the applications, dismissing the proceedings, and declaring that the proposed local laws may not be adopted by initiative and referendum under Municipal Home Rule Law §37.

Facts

A. Filing of Petitions and Transmission of City Clerk's Certificates

On July 7, 1966, there were filed with the City Clerk two initiative petitions, purportedly pursuant to Municipal Home Rule Law §37, each for the submission of a proposed local law to the electors of the City at the next general election, entitled respectively as follows:

The *Cassese* Petition:

> [1] "A Local Law to amend the New York City Charter in regard to the establishment of a procedure for handling civilian complaints against members of the police department".

The *Monplaisir* Petition:

> [2] "A Local Law to amend the New York City Charter in relation to the disciplinary procedures of the New York City Police Department, prohibiting the creation of a civilian complaint review board composed of members who are not deputy police commissioners".

The City Clerk notified the City Council of the filing of the petitions and annexed to such notification copies of the proposal local laws.

On August 5, 1966, the City Clerk transmitted to the Council a certificate with respect to each petition, containing a finding that the petition does not comply with the requirements of law in that the local law proposed thereby is not a local law amending the city charter, and therefore may not be enacted by the initiative and referendum procedure provided in Municipal Home Rule Law §37.

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[1] Hereinafter referred to as "Local Law A".

[2] Hereinafter referred to as "Local Law B".

The certificate with respect to the *Monplaisir* petition sets forth the additional findings that the petition does not contain a sufficient number of signatures to entitle the signers thereof to have the proposed local law considered by the Council under Municipal Home Rule Law §37, and that the proposed law is vague, indefinite, ambiguous and incomplete.

B. Facts Leading Up to the Filing of the Petitions

Since 1953, there has been established, by administrative orders of the several Police Commissioners, a procedure, applicable specifically to complaints by civilians of abuse of authority or unnecessary use of force by members of the police force. This procedure has been revised by orders of the several Commissioners from time to time. It consists essentially of a preliminary investigatory process by an investigating unit and a review of the results of the investigation by a review board, to determine whether or not disciplinary charges should be formally preferred as provided in Adm. Code §434a-14.0 (Minutes of Council May 18, 1965, pp. 953-965).

As a result of public discussion, studies and criticism as to the effectiveness of the Commissioner's civilian complaint review procedure, particularly as to whether there was a sufficient degree of public confidence in its impartiality, the Police Commissioner, on May 17, 1966, revised the civilian complaint review procedure by the issuance of General Order No. 14.

The Order established an advisory review board consisting of 3 members appointed by the Police Commissioner and 4 members appointed by the Mayor. Its duty is to review the facts obtained by the investigating unit relative to each civilian complaint and make recommendations to the Police Commissioner as to whether formal charges should be preferred on the basis of the complaint. General Order No. 14 also provides for an Executive Director charged with over-all administration of the civilian complaint procedure and a Deputy Director vested with overall supervision of the unit investigating the complaints. Both officials are to be appointed by the Police Commissioner from among qualified candidates recruited and screened by the Mayor.

On May 9, 1966, an action was brought by five patrolmen of the police department, for judgment declaring General Order No. 14 invalid, and enjoining its enforcement.

Mr. Justice Murphy upheld the Police Commissioner's administrative order as a valid exercise of the administrative power vested in him by Charter §434 and Adm. Code §434a-14.0, and of the power of an administrative official to avail himself of such advice and assistance as, in his judgment, is most competent, to carry out his official duties. *Cassese et al.* v. *Lindsay et al.,* Sup. Ct., N. Y. Co.; N. Y. L. J. June 24, 1966, p. 12.

The opponents of General Order No. 14, having thus far failed to obtain their objectives by judicial proceedings, sponsored the two petitions involved in the instant proceedings. Each local law, if it could legally be adopted by the electorate, would have the effect of annulling General Order No. 14.

The proposed Local Laws and the relevant provisions of law are set forth in the Appendix (*infra,* pp. A1-A7).

POINT I

The proposed local laws do not "amend a City Charter" within the meaning of Municipal Home Rule Law §37. Therefore they may not be enacted by the initiative and referendum procedure of Municipal Home Rule Law §37.

A. Statutory Test: A local law must, in fact, and not merely in form, amend the New York City Charter in order to be the subject of initiative.

It is well settled that the power to enact the proposed legislation by initiative and referendum must be found in a clear constitutional or statutory grant of power. Otherwise, enactment of the proposed local laws by initiative and referendum is unauthorized and invalid. *Matter of McCabe* v. *Voorhis* 243 N. Y. 401, 413 (1926); *Matter of Burke* v. *Kern* 287 N. Y. 203 (1941); *Matter of Astwood* v. *Cohen* 291 N. Y. 484, 491 (1944).

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The petitioners claim to find such a grant of power in Municipal Home Rule Law §37.

In this, they are in error.

Municipal Home Rule Law §37 authorizes initiative and referendum only for adoption of a "local law amending a city charter (however extensively) or providing a new city charter."

Petitioners do not assert that the proposed local laws are "providing a new city charter". Therefore the petitions must be held to be unauthorized and invalid unless the proposed local laws "amend a city charter, however extensively."

The fact that each proposed local law is designated as an amendment of the New York City Charter is, in and of itself, immaterial. The only statutory test is "whether the law is in truth an amendment of the Charter or is merely labeled as such." *Astwood,* supra, at p. 489.

In *Astwood,* the Court of Appeals set forth the method of applying the statutory test as follows: (at p. 488)

> "* * * we must find the pathway of decision, not by *generalization,* but by application of the statutory test to the facts of each case. The facts which control will be found in the nature of the proposed local law and its relations to the provision of a *particular* city charter. The most that can be said is that in the consideration of these controlling facts will be found the basis for determination as to whether *in the particular* case the proposed local law is *in truth* an amendment of the charter or is so far unrelated to the Charter as to be an amendment in name only." (Emphasis added.)

B. Under the "statutory test", the proposed local laws do not amend the City Charter but are in fact amendments of the Administrative Code and General Order No. 14.

Examining "the controlling facts" in the instant case, i.e. the New York City Charter and the proposed local laws, it is clear that the proposed local laws are not, in truth, amendments of the Charter within the meaning of Municipal Home Rule Law §37. They leave unchanged the Charter's short-form grant of essential powers to the Police Commissioner, and amend only the detailed methods or procedures by which such powers are carried out, namely, Adm. Code §434a-14.0 and General Order No. 14 promulgated by the Police Commissioner.

1. New York City has a short-form Charter and a detailed Administrative Code.

a. Analysis of Texts

The New York City Charter is a short form charter which discloses an intent to distinguish fundamental law from laws regulating administrative functions. It provides for numerous administrative departments and indicates, in general language, the essentials of the organization of each department and its basic powers. But the details pertaining to the administration of the various departments are prescribed by the voluminous Administrative Code. In that statute is found a restatement and codification of the administrative laws pertaining to the City, supplementing the Charter. *Report of 1936 New York City*

Charter Revision Commission filed with City Clerk Aug. 17, 1936, p. 33. *McQuillan Municipal Corporations* 3rd Ed. Vol. 2. §9.19 pp. 1513-515; *Matter of Astwood* v. *Cohen* 291 N. Y. 484, 488-89 (1944).

The purpose of such distinction in the New York City framework of government is to confine the laws relating to methods of administration to a code which will be subject to frequent amendment by the elected local legislative body, without check or restraint by any other local authority, and to implementation by the administrative officials to whom discretion is granted by law, subject to check by the local legislative body. Such flexibility of revision is intended to enable the local legislative body and the administrative officials, by the application of experimentation, experience, and expertise, to achieve the greatest possible efficiency in the complex day to day operations of the City Government.

A concrete illustration of this type of flexible provision is General Order No. 14, which supplements the disciplinary procedures of Adm. Code §434a-14.0 and is the real target of the proposed local laws.

In the first *Cassese* case, *supra,* p. 6, Mr. Justice Murphy described the nature of the Commissioner's administrative action in promulgating General Order No. 14 and emphasized the flexibility of his administrative power to deal with problems as they develop, stating:

> "It is also clear, too, that the Police Commissioner should be permitted to operate this most critical City agency with sufficient aid, if required and requested * * *.

* * *

> "Whatever may be the effect [upon the morale of the police force] upon implementation, that consideration is not the primary consideration of the Court but of the Police Commissioner himself * * *. If in its application, problems develop or it interferes with correct, orderly and efficient police work, the Commissioner is vested with the power to modify or revoke the order." (Matter in brackets added.)

In marked contrast to this flexible category of laws, the Charter, as fundamental law, is intended to consist of broad, far-reaching provisions, which are not expected to be amended too frequently. Thus, special and formal procedures such as referendum, or initiative and referendum, are made applicable to these fundamental far-reaching provisions, so as to distinguish them from ordinary legislation enacted by the local legislative body and from the regulations which may be promulgated by administrative officials pursuant to discretion vested in them by law.

b. Historical Development of Charter and Code

Prior to 1938, the Charter governing the City of New York (L. 1901 ch. 466 as amended) was a massive volume of municipal laws. It set forth not only the fundamental organization of the City but a vast amount of detailed provisions governing its day-to-day operations.* In addition, thousands of other state and local laws scattered throughout the statute books modified, supplemented or otherwise affected it. *Report of New York City Charter Commission, filed with City Clerk on August 17, 1936,* pp. 4-6.

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* See Asch's *Greater N. Y. Charter,* 1927 Ed., consisting of 1755 sections and 1136 pages; and 1936 Supplement consisting of 457 pages.

Efforts to revise the law applicable to New York City on the basis of an organic or structural short form charter to be followed by an administrative code containing the adjective or administrative details were advanced as far back as 1907, and were renewed from time to time. *Report to Legislature of 1907, New York City Charter Revision Commission* (Ivins Commission), New York Senate Documents Vol. II, No. 10, p. 8; *Report of the Board of Statutory of the City of New York,* Legislative Document (1938) No. 56, pp. 6-8).

The Report of the Ivins Commission to the Legislature in favor of a short-form charter and an administrative code explained the meaning of such a proposal as follows:

> "In making this separation it has been actuated by the desire to formulate a charter of a permanent or abiding nature, *for it recognizes that the administrative code will doubtless require frequent amendment, either for the adoption of improved methods or in response to successful administrative practice. The code in the nature of things should be a more fluid body of law, susceptible of change and evolution without change or alteration of the charter proper.* The advantage of this dual statute will, we think, be at once apparent to the legislature and the people. The charter can and should be placed in all hands and will be readily comprehended. The administrative code, not being of such fundamental importance, *bears a closer resemblance, for instance, to the ordinances of the council and belongs in a somewhat larger way to that body of adjective law which includes local ordinances and regulations.* It is, therefore, not of such general interest or fundamental importance as the charter, but

> is of special and particular interest as the embodiment of details affecting the conduct of city or departmental business. (Emphasis supplied.) (Set forth in Report of 1921 New York Charter Revision Commission, pp. 7-8.)

In 1936 and 1937, a short-form Charter and long-form administrative code proposal was finally adopted into law as a result of the combined actions of the State Legislature, the 1936 New York City Charter Revision Commission and the local electorate.

Thus, L. 1934 ch. 867 established a New York City Charter Revision Commission and directed it to prepare a charter, for submission to the electorate. Chapter 867 stated that the charter shall be "adapted to the requirements of such city" and "shall set forth the structure of the city government and the manner in which it is to operate".

The Commission, following the intent of the statute, determined that the "compilation, codification and revision of the mass of inconsistent municipal law should not be included in a charter designed to set forth the structure of the government and the manner in which it is to operate." 1936 Charter Commission *Report,* p. 5. Accordingly an appropriation was obtained from the City for a separate study by the Commission of all laws relating to the government of the City. Thereafter the State Legislature formalized the study by establishing a New York City Board of Statutory Consolidation (L. 1936, Ch. 483).

Section 2 of L. 1936 ch. 483 provided as follows:

> "§2. If a short form of charter be affirmatively voted by a majority of the qualified electors of the city of New York, pursuant to Chapter eight hundred sixty-seven of the laws of nineteen hundred thirty-four, then it shall be the duty of such board to prepare an administrative code setting forth *the details of administration* and which shall harmonize with the provision of such charter which may be so voted. (Emphasis added.)

The New York City Charter Revision Commission did "prepare for submission a short form charter, as contemplated by the Legislature, setting forth the structure of the city government and the manner in which it is to operate." (1936 *Report,* p. 6.) This Charter, known as the "1938 Charter," was adopted by the electorate at the general election of 1936 to become effective January 1, 1938.

The Commission stated in its Report (p. 6):

> "The voters may properly be asked to put the seal of their approval on the fundamental plan of the City government and on the general principles which are to govern its operation; *but the submission to the voters of a great mass of detailed administrative regulations would be confusing and would tend to distract attention from principles of government.* If the proposed Charter is approved by the electorate, the structure of the law relating to the City will be greatly simplified and made more readily intelligible by division into two parts:
>
> (1) The Charter itself, containing what the Ivins Commission described as 'the organic law of the city's being,' to be in some respects not too easily amendable; and

> (2) An Administrative Code for the guidance of the departments and the regulation of numerous matters of detail." (Emphasis added.)

The Commission further described the relationship of the Charter and Code, as follows (Report p. 36):

> "In its short charter the Commission has indicated only the essentials of the organization of each department and, in as general language as possible, its essential powers, leaving to the code the large amount of administrative detail which is contained in the existing charter and other law."

After the adoption of the Charter, the Board of Statutory Consolidation prepared an administrative code as directed by the Legislature. In its report to the State Legislature, accompanying the introduction of the Code bill, the Board described the relationship of the Charter and Code in the following terms (Leg. Doc. 1938, No. 56, pp. 6-7; also set forth in Sessions Laws of 1937, Extraordinary Session L. 1937, Ch. 1929):

> "It must be borne constantly in mind that the New Charter was intended only to outline in skeleton form the different agencies of the city government and their basic functions. It does not purport to embody all of the provisions of law relating to the government of the city. It provides the structural framework of the city government and is intended to set forth the organic law relating to the city. (Report, p. 6)
>
> * * *
>
> "An analogy might be made describing the relationship between the Administrative Code and the Charter of the City of New York, as on a par with the relationship between the statutory law and the

> constitution of a sovereign body, wherein those provisions which were intended to be flexible and to yield to changing conditions would be subject to easy amendment, while primary grants of powers and important limitations upon abuses of power would be contained in a body of law which would express fundamental principles and ideals of government. These would not be expected to change except over long periods of time." (Report, p. 7)

The State Legislature adopted the Administrative Code presented by the Board of Statutory Consolidation, thus formalizing the above described relationship between the Charter and Code. (L. 1937 ch. 929)

In 1961 a New York City Charter Revision Commission was appointed by the Mayor pursuant to L1961 ch. 87 to prepare a proposed charted for submission to the voters. The Commission prepared a charter which continued the basic structure of the 1938 charter but reallocated the powers so that the executive, budgetary and fiscal powers would be more clearly defined and separated. *Report of The Charter Revision Commission of The City of New York July 20, 1961 p. 2.* The Commission also determined to continue the pattern of a short-form charter and a long-form administrative code. *id.* p. 7; 1963 Charter §1140.

The Charter was approved at the general election of 1961, to become effective January 1, 1963, except for certain enumerated provisions which took effect in 1962. The Board of Statutory Consolidation then prepared an extensive bill to harmonize the Administrative Code. That bill was enacted into law by the Legislature. (1963 Report, of Board of Statutory Consolidation of the City of New York to the Legislature; L. 1963 ch. 100).

Thus, the City continues to be governed by a short-form charter setting forth the essential structure of the city government in general terms, and a long-form Administrative Code regulating the methods and procedures for carrying out the purposes and basic governmental structure contained in the Charter. *Astwood* case, *supra,* 291 N. Y. at p. 489.

2. *Distinction between Charter and Code clearly shown in Police Department provisions*

Examining the legislative history and texts of the Charter and Code provisions governing the Police Department, we find a legislative intent that only the essential functions of the Police Department are intended to be set forth in the charter in the most general terms, while the provisions governing *methods* of administering and disciplining the police force are intended to be confined to the administrative code, with the expectation that they would be easily amended as necessary from time to time by the elected local legislative body or implemented by the administrative officials to whom discretion is given by law.

Present Charter §434 (*infra,* p. A6) and the provisions of the Code governing the methods of administering and disciplining the Police Force are all derived from the 1901 long form Charter. See Appendix, p. A8.

The present provisions of Charter §434 (granting general power of administration of the department) and of Administrative Code §434a-14.0 (governing disciplinary procedures) were intermingled in the 1901 charter. (§§292, 300 and 302.)

When the 1936 Charter Revision Commission carried out the State Legislature's mandate to submit to the electorate a short form charter "setting forth the structure of the city government and the manner in which it is to operate" in anticipation of the preparation of an "administrative" code in harmony with the provisions of the short form charter (L. 1934 ch. 876; L. 1936 ch. 483), it selected from 1901 Charter §§292, 300 and 302, as basic organic charter law, only the three sentences now set forth in Charter §434 (*infra*, p. A6). All the provisions in 1901 Charter §§292, 300 and 302 regulating administrative and disciplinary procedures were excluded from the short form Charter and left for incorporation in the Administrative Code §434a-14.0 and in other sections of Title A of Chapter 8 of the Code.

The 1963 Charter Revision Commission in the submission of the New Charter and the Board of Statutory Consolidation in its harmonization of the Administrative Code continued the same differentiation between the Charter and Code subject matters. (Charter §§434, 1151; L. 1963 ch. 100 §1714.) The enactments of the Administrative Code by the 1937 and 1963 Legislatures thus represent a legislative approval of this differentiation.

Nine short sections now make up the entire Charter chapter on the Police Department. Each section deals only with the most essential aspects of the Department in the briefest and most general terms (*infra*, p. A14).

Moreover the *entire* subject of the Police Commissioner's powers over the department is set forth in the three brief sentences of Charter §434 as follows:

> "§434. Commissioner; powers and duties. a. The commissioner shall have cognizance and control over the government, administration, disposition and discipline of the department, and of the police force of the department.
>
> The commissioner shall be the chief executive officer of the police force. He shall be chargeable with and responsible for the execution of all laws and the rules and regulations of the department."

The Police Chapter of the Charter is devoid of any provisions specifying how the "government, administration, disposition and discipline" of the department and the force shall be carried out.

In contrast, the police chapter of the Administrative Code contains no less than 41 full sections specifying details and methods of administering and disciplining the police force and department (Chapter 18, Title A, §§434a-1.0 through 434a-38.0; New York City Charter and Administrative Code, Williams Press, Inc. V. 2, pp. 471-507; *infra,* p. A15); and an additional 55 sections detailing the pension, retirement, and disability benefits and procedures affecting policemen (§§B18-1.0 through B18-55.0 New York City Charter and Adm. Code; Williams Press, Inc. V. 2, pp. 588-634; *infra,* p. A15).

Approximately 29 other provisions set forth in great detail other procedures and activities over which the police department has specific jurisdiction (Adm. Code §§435-1.0 through 436-10.0, New York City Charter and Code, Williams Press, Inc. v. 2 pp. 507-588; *infra,* p. A15).

3. *Provisions governing procedures applicable to misconduct of members of the force are dealt with only in the Code.*

Procedures applicable to misconduct by members of the Police Force are dealt with specifically in §§434a-14.0 (Discipline of members); 434a-15.0 (limitations on suits for restoration or reinstatement to the force, or for payment of compensation deducted or withheld); 434a-30.0 (suspension of members of force); 434a-22.0 (rehearing of charges; reinstatement of members of the department); 434a-23.0 (dismissal for absence without leave).

Administrative Code §434a-14.0 empowers the Commissioner to punish a member of the force by imposing specifically enumerated punishments upon convictions by him of misconduct. Such punishments may be imposed only "on written charges made or preferred" against the member.

Adm. Code §434a-14.0 does not prescribe the manner in which the Commissioner shall determine whether or not to prefer such formal charges. Since formal charges against a member can only be preferred after a preliminary inquiry is made into a civilian or other complaint of police misconduct, the Code section must be deemed to impliedly grant full discretion to the Commissioner as to the procedure by which he will make his determination. The procedure for reviewing civilian complaints, instituted administratively by police commissioners over the past 13 years, provides the preliminary inquiry contemplated in Administrative Code §434a-14.0. See first *Cassese* case, *supra,* p. 6.

Thus, any local law which restricts or regulates the manner in which the Police Commissioner proceeds to make the determination whether or not to prefer formal charges under Administrative Code §434a-14.0 is a direct amendment of Administrative Code §434a-14.0, and is only remotely related to the Charter. The relationship of such a local law to the Charter provision is merely indirect and similar to that which every provision of the Administrative Code bears to the Charter. The Charter law, being general and fundamental, is at the core of the City government. Therefore, all the detailed provisions of Administrative Code must necessarily be related to it in some way. This was recognized by the Legislature when it adopted the numbering system of the Administrative Code, keying each administrative code section to a particular section or chapter of the Charter. *1937 Report of Board of Statutory Consolidation, Leg. Doc.* 1938 No. 56 p. 36. In this sense, the Administrative Code provisions do not differ from any other laws, outside the Charter, which may be applicable solely to the City of New York.* The latter, like the Code provisions, are necessarily related to the Charter in some indirect manner. Yet such a relationship would obviously not be deemed to make them provisions amendable by initiative and referendum under Municipal Home Rule Law §37.

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* *E.g.,* L. 1938 ch. 464 (Appropriations for Columbus Day parades); Gen. City Law §60 (plastering); *id.* §21-a (overnight parking); *id.* §20 subd. 29 (medical benefits for employees); *id.* §20 subd. 2, and §20-d (acquisition of omnibus lines).

If every administrative detail could be deemed a charter amendment merely because of its associative relationship to the broad Charter grant of discretion, then any kind of proposal whatsoever affecting the City could be initiated by the electors, and the limitation of Municipal Home Rule Law §37 would be rendered meaningless.

4. *The proposed local laws leave unchanged the Charter's general grant of essential powers to the Police Commissioner, and relate solely to the detailed methods or procedures for the effectuation of such powers which are set forth in the Administrative Code.*

Under Charter §434, the Commissioner's essential powers are "cognizance and control of the government, administration, disposition and discipline of the department, and of the police force." The Charter does not specify the methods or procedures for effectuating or exercising such "cognizance and control." The Charter contemplates that all such procedures and methods are to be regulated or restricted by the provisions of the Administrative Code (Adm. Code Ch. 18).

The proposed local laws are merely additional limitations of the same character as those found in the Code. Therefore, they do not in fact change the meaning of "cognizance and control" but merely amend the Code by adding one more collateral restriction.

The proposed local laws, on their face, demonstrate this conclusion.

The title of Local Law A specifically states its subject to be "the establishment of a *procedure* for handling civilian complaints against members of the police department." *Infra,* p. A4. (Emphasis added.) Such a subject is closely and directly allied to Adm. Code §434a-14.0, which regulates disciplinary proceedings and bears only the most remote and indirect relationship to the short form grant of essential powers in Charter §434. This indirect relationship is shown to be even more indirect and remote by the Local Law's numerous detailed specifications restricting the composition of any board established to review such complaints (proposed §440 subd. c).

The strong affinity of Local Law A to Adm. Code §434a-14.0 is also evidenced by proposed §440 subd. e. That subdivision provides that the proposed local law shall not be construed to permit a violation of the provisions of Adm. Code §434a-14.0, subd. b. It does this, not by referring to the Code section by number but by using the precise words of the Code section. Thus, it states that the local law is not to be construed to permit a "member to be fined, reprimanded, removed, suspended or dismissed except upon written charges, after such charges have been examined, heard, and investigated by the Commissioner, one of his deputies or the assistant to the Commissioner" (*cf.* Adm. Code §434a-14.0 subd. b, *infra,* p. A6).

Local Law B similarly demonstrates, on its face, its affinity to the Code and General Order No. 14 and its remote and indirect relationship to the Charter.

Its title expresses its subject as "prohibiting the creation or maintenance of a civilian complaint review board composed of members who are not deputy police commissioners." Thus, it is in effect, nothing more than, and could just as accurately have been entitled "a local law prohibiting General Order No. 14."

Further evidence of its remoteness from Charter §434 and its proximity to Code §434a-14.0 is found in the fact that its sponsors had to add to the broad powers of the Commissioner under section 434, the new and narrow term "disciplinary procedures"—a term heretofore appropriate only to a description of the Code provisions.

Both proposed local laws address themselves only to that area of government which is inherent in the powers of even the most unimportant public official, namely, his discretion to seek advice from whatever source he deems competent to aid him in making his official determinations. Opinion of Mr. Justice Murphy in *Cassese* v. *Lindsay, supra,* p. 6. As such they bear to the Charter the most remote relationship which any area of City government can bear to a Charter provision. Thus, it is evident that the proposed local laws are directed at changing, *not* the Charter, but merely an administrative order of the Commissioner, issued pursuant to his inherent power to obtain the best advice he deems possible to aid him in carrying out his duties under Code §434a-14.0.

In view of the foregoing, the proposed local laws cannot possibly be construed to be amendments of the New York City Charter within the meaning of Municipal Home Rule Law §37, and are therefore not subject to adoption by the initiative process.

C. The history of initiative legislation in this State, and in the City of New York, in particular, confirms the conclusion that the proposed local laws are not proper subjects for initiative under Municipal Home Rule Law §37, in so far as New York City is concerned.

1. The initiative legislation was intended to carry forward and preserve the limitations on initiative in a city having a short-form charter.

There are basically two types of direct legislation with respect to municipal affairs authorized in this State:

(1) *Referendum*: i.e. approval or nullification by the local electorate of laws adopted by the local legislative body. Referendum may be mandated by law for certain subjects (mandatory referendum) or may be permitted by law for certain subjects if a specified number of electors petition to have the law submitted to referendum (referendum on petition).

(2) *Initiative and referendum*: i.e., initiation of a new law by petition of a specific number of electors and its passage by approval of the electors at a general or special election, without action by the elected local legislative body.

The first type, i.e., the submission to the electorate of laws passed by a legislature (which is not involved in the present case) is as old as the history of the State. The Constitution provides for statewide referendum in the adoption of constitutional amendments. Moreover, the State Legislature from earliest times has submitted City Charters, enacted by it, to the local electorate for approval (e.g. Syracuse, L. 1847 ch. 475; Brooklyn, L. 1849 ch. 47; New York City, L. 1830 ch. 122; L. 1849 ch. 187). It has also permitted cities, by petition and referendum, to adopt one of several forms of city government enacted by the State Legislature. Optional City Government Law L. 1914 ch. 444. (The latter is a hybrid process more akin to referendum on petition, now provided for in Municipal Home Rule Law §24 than to initiative and referendum.)

The 1924 City Home Rule Law (L. 1924 ch. 363) was the first state-wide grant of referendum powers to the electorates of cities. It provided that local laws on specified far-reaching subjects *must* be approved by the electorate, before they may become effective (id. §15, "mandatory referendum") and that the electorate, by petition, *may* require local laws on other enumerated far-reaching subjects to be submitted for approval of the electorate before they can become law (*id.* §§16, 17; "referendum on petition").

The second type of direct legislation, *initiative and referendum,* (which is under consideration in the instant case) is a relatively late development in this state. Its social and governmental value, particularly in respect to matters of municipal administration, was initially and is now a subject of controversy. Munro, William Bennett, *The Initiative Referendum and Recall,* D. Appleton and Co. (N. Y. 1912); Professor Arthur Bromage, *"Direct Democracy: Consensus or Chaos?"* in *Colorado Municipalities,* July 1966, pp. 180, 193-198.

Prior to 1924, initiative powers were granted to some cities, though not to the City of New York: e.g. Buffalo,

L. 1914 ch. 217 §31; Batavia, L. 1914 ch. 352 §52; Olean L. 1914 ch. 436 §120. Each of those cities to which initiative powers were granted was governed by a commission form of government, i.e. a single body of elected officials which exercised the legislative, executive and administrative powers of the city. Since the checks and balances inherent in the traditional system of separation of such powers are lacking in a commission form of government, the process of initiative and referendum was deemed to provide a compensating check on such a single elected governing body.

When the 1924 City Home Rule Law was adopted, mandatory referendum and referendum on petition with respect to a number of fundamental, far reaching subjects were granted to *all* cities. L. 1924 ch. 363 §§15, 16, 17. But only an extremely limited grant of *initiative and referendum* powers was enacted. It was made available only to all cities having a commission form of government, and only for the purpose of adopting a local law creating a charter commission to draft a new city charter for submission to the electorate. This limited utilization of the initiative power to compensate for the weakness of the commission form of City government was in accord with the generally prevailing view as to the purpose of initiative. *Munro, William Bennett,* (ed.), *The Initiative, Referendum and Recall, D. Appleton and Co.* (N. Y. 1912) p. 13.

The 1936 New York City Charter Revision Commission which prepared and submitted to the electorate a short-form basic Charter as directed by the State Legislature, to be followed by enactment of a detailed administrative code, found a limited role for the *initiative and referendum* process in the City of New York, which process had hitherto been restricted to cities having commission forms of government. Although the 1938 City Charter was to retain the traditional separation of legislative and administrative powers (1936 Charter Revision Commission Report, p. 13) the Charter Commission recognized a need on the part of the electorate to initiate a change to a *new* or *revised structure* of City government, such as a city manager plan (*id.*).

It therefore included in the New York City Charter, not only authority to change the Charter by *referendum,* in a manner similar to that provided under the then City Home Rule Law §§15, 16 and 17, but also by *initiative and referendum.* Initiative was granted only under "strictly guarded and limited provisions of the charter itself" and extended only "to the manner of voting for elective officers of the city or abolishing elective offices or creating new offices * * *". Report, pp. 13, 39-42. 1938 Charter §44.

In further explanation of the limited role to be played by these two methods of direct legislation, the Report stated (pp. 39-42):

> "Two methods are provided for the amendment of the charter:
>
> (1) By local law approved by the Board of Estimate with referendum in certain cases.
>
> (2) By initiative and referendum.
>
> The first method is provided by the City Home Rule Law. The charter conforms closely to the provisions of that law with respect both to the subject-

matter of local laws and the manner of adopting them. All local laws passed by the Council amending or repealing any provision of the charter must have the approval of the Board of Estimate.''

''*Safeguards against the ill-considered adoption of fundamental amendments in the form of local laws by the Council with the assent of the Board of Estimate are provided by requiring referendum vote on changes of a far-reaching character. The City Home Rule Law today requires a referendum vote on* an amendment which changes the local legislative body or the number of votes to be cast by its members, changes the veto power of the Mayor or the law of succession to the mayoralty, abolishes an elective office or changes the method of removing an elective officer or changes the term of or reduces the salary of an elective officer during his term of office, abolishes, transfers or curtails any power of an elective city officer, creates a new elective office, changes a provision of law relating to public utility franchises or to the membership or terms of office of the Municipal Civil Service Commission, reduces the salary of a city officer or employee which has been fixed by state statute approved by referendum, or provides a new charter for the city. *The proposed charter requires in addition* a referendum vote on an amendment which changes the composition of the Board of Estimate or the voting power of its members, transfers powers and duties from a Mayor's department to an agency the head of which is not appointed by the Mayor or vice versa, dispenses with a provision of law requiring a public notice or hearing as a condition precedent to official action, dispenses with a requirement of law for public bidding or for public letting of contracts, changes a provision of law governing the classes or character of city bonds or other obligations, the purposes for which any class of obligations may be issued or the amount thereof, changes provisions of the charter relating to the audit of the city's accounts, removes restrictions on the sale, lease or other disposition of city property, curtails the powers of the City Planning Commission, changes the vote in the Board of Estimate required to take action without or contrary to its recommendation, or changes the charter provisions safeguarding the independence of the Commission, changes the provisions of the charter for its own amendment or changes the provisions of the charter requiring the approval of the Board of Estimate of local laws of certain kinds (see pages 16, 17, *supra*) or limiting the power to authorize capital projects not included in the capital budget, or changes certain provisions of the charter inserted as safeguards against corrupt practices or abuse of power.

The second method of amendment, that of initiative and referendum, is new, although the principle of initiating changes changes in the charter is recognized by Section 20 of the City Home Rule Law, which authorizes a referendum on the initiative of voters on the question of creating a commission to prepare a new charter. The initiative as provided in the proposed charter is limited to proposed charter amendments in relation to the manner of voting for elective officers of the city or abolishing elective offices or creating new offices, including if so provided a transfer of powers in connection therewith, but not authorizing the repeal or modification of limitation on powers contained in the charter. *This initiative is broad enough to admit of the submission to the people of broad questions of principle in relation to the frame of the government such as may appropriately be submitted to popular vote; but it was not thought wise to permit the initiation of questions of administrative detail that*

> *can more deliberately and effectively be dealt with by a legislative body.* * * *''
>
> ''Under this system, the people will have the opportunity of themselves initiating and adopting a revision of the structure of the City's government *along broad lines* for which there may be a popular demand, *while all ordinary amendments will be made by the legislative process of adopting local laws.*''
>
> ''The proposed charter, containing only matters directly affecting the property, government and affairs of the city with ample provision for its own amendment by local law under appropriate safeguards, and permitting *far-reaching amendment* by initiative and referendum, should be far less open to impairment by state legislation than has been the case in the past.'' (Emphasis added.)

With the example of the 1936 New York City Charter Revision Commission before it, the State Legislature, in 1937 (the same year in which it enacted the New York City Administrative Code in accordance with its earlier formula for a short-form New York City Charter and a long-form Administrative Code), adopted City Home Rule Law §19-a (the predecessor section of Municipal Home Rule Law §37). See L. 1937 ch. 479. The 1937 act for the first time extended to *all* cities the right to use *initiative and referendum* to adopt a local law ''amending a city charter.''

Following as it did so soon after the discussion in the Report of the 1936 Charter Revision Commission as to the proper utilization of the initiative procedures authorized in the New York City Charter, and the adoption of the Charter by the 1936 electorate, it is reasonable to assume that the limitation of the powers granted in §19-a, to a "local law amending a city charter", incorporated and preserved, with respect to a short-form charter, the general principles which animated the 1936 Charter Revision Commission: Namely to place fundamental charter law on a different basis from ordinary law by giving the electorate the opportunity of initiating and adopting measures revising "the structure of the city's government along broad lines * * * while all ordinary amendments will be made by the legislative process of adopting local law" (*supra,* p. 32).

The 1937 Act (City Home Rule Law §19-a) has since been amended from time to time. However, its basic limitation of the initiative process to adopting a local law "amending a city charter" has been changed in only one respect: namely, by extending the use of initiative to a local law *adopting* a *new* charter, as well as to one *amending* a charter. See legislative note appended to L. 1957 ch. 1027, *infra,* p. 50.

Thus, the original phrase "local law amending a city charter" was changed by L. 1944 ch. 602 to read "a local law amending a city charter, *however extensively*". The purpose of the 1944 amendment was to overrule a prior judicial decision that a proposed local law amending a City Charter so extensively as to constitute it, in effect, a *new* charter, could not be the subject of initiative [*Maylender* v. *Morrison* 284 N. Y. 575 (1940)]. The ground for the *Maylender* decision was that (at the time of the decision) the statute did not authorize initiative for adoption of a *new* charter but only for a charter *amendment* (*infra,* p. 50). Thus, the 1944 phrase "however extensively," was not intended to open the door to the use of initiative for the details of day-to-day governmental operations in a city having a short-form charter. Its sole purpose was to retain the 1937 test of a *Charter* amendment (i.e. fundamental law in the case of a short-form charter), but to permit the change in such fundamental (charter) law to be so extensive as to constitute, in effect, a new charter.

This is emphasized by the fact that the 1944 amendment simultaneously added the following definition to §2 of the then City Home Rule Law:

> "* * * the term 'charter amendment' means any change in an existing charter presented as such under authority of this chapter or any charter or state statute. A charter amendment may be of any extent and may deal with any number of subjects. *A proposal presented as a charter amendment shall not be rejected as such on the ground that it constitutes a new charter*" (Emphasis added.)

When a subsequent judicial decision again failed to give effect to this very purpose, the 1957 Legislature added the phrase "or providing a new charter" to Municipal Home Rule Law §37, so as to make its 1944 intention crystal clear. *Application of Grenfell* 185 Misc. 558 (1945); *infra,* p. 50.

Thus the foregoing history demonstrates that Municipal Home Rule Law §37 intended to preserve and incorporate, in respect to the New York City short-form charter, the limitation on initiative stemming from the legislatively adopted purposes of the separation between the short-form charter and Administrative Code; and that by reason of such statutory limitation, the proposed local laws, being in fact amendments of the Code and General Order No. 14, may not be the subject of initiative.

2. The initiative legislation was not intended to authorize the use of initiative to nullify prior administrative action such as General Order No. 14.

The 1937 Act, which adopted City Home Rule Law Section 19 (a) (the predecessor to present section 37) must be read in conjunction with the other provisions of law on referendum which existed in 1937 and which remain substantially unchanged today. When so read, there is further and conclusive indication that the present section 37 was never intended to permit nullification of administrative action such as is proposed here.

When section 19 (a) was adopted in 1937, sections 15, 16 and 17 of the City Home Rule Law specifically set forth those subjects which could be nullified by the electorate through referendum. Every law so designated in these sections was one which had been adopted by the local legislative body. There is no provision in these sections authorizing nullification of an *administrative order* such as General Order No. 14 of the Police Commissioner.

It was the apparent intent of the Legislature in 1937 that nullification of administrative action be left to the local legislative body (the City Council) and that only nullification of *Council* action be left to the electorate through permissive or mandatory referendum. When viewed in this historical and statutory framework, these proposals to nullify General Order No. 14 through a purported "Charter Amendment" emerge as nothing more than devices to circumvent the legislative limitations on direct legislation. *Cf. Landt* v. *Wisconsin Dells,* 141 N. W. 2d 243, 247 (Sup. Ct. Wisc. 1966).

As the Court warned in *Kupferman* v. *Katz,* 243 N. Y. S. 2d 773, 19 A. D. 2d 824 (App. Div. 1st Dept 1963): "It has also been held that a transparent attempt to formulate a mandatory legislative referendum on some technical basis will not suffice, if in fact the attempt is really to avoid governmental responsibility and shift the burden of decision to a public poll (*Matter of Astwood* v. *Cohen,* 291 N. Y. 484, 490-1, 53 N. E. 2d 358, 360-1)."

D. In a populous city like New York the legislative differentiation between Charter and Code prevents public harm which would result from an unrestricted use of initiative power.

A conclusion that a local law nullifying or curtailing an exercise of administrative discretion could be a Charter Amendment under Municipal Home Rule Law §37 would have grave consequences in a city of 8 million people—indeed, the very results which the legislative separation between Charter and Code Law and the limitation of initiative in relation thereto were deliberately intended to avoid.

For example, Municipal Home Rule Law §37 permits an amendment to be placed before the electorate upon a petition signed by 30,000 eligible voters.

The Police Force alone consists of approximately 28,000 members. The Commissioner, in exercising cognizance and control over administration of the force, issues numerous decisions and orders daily relating to such matters as assignments to general or special duties, recommendations for advancement or salary increases, appointments of new members, training and practice requirements for old and new members, standards of conduct in relation to the city and the public, standards and principles of crime fighting and a myriad of other details—all in the exercise of the official discretion necessary to administer the department.

If a local law curbing the Commissioner's discretion with respect to anyone of these matters could be designated as a local law "amending the city charter", merely because fundamentally, all city powers relate back to the Charter, and the smallest exercise of any official discretion necessarily bears some associative relationship with fundamental powers,—it would be very easy for a force as large as the police force to obtain 30,000 signatures and place all its dissatisfactions before the electorate. Decision-making as to the day-to-day operations of the police department could thus be transferred to the electorate merely at the will of the 28,000 man police force.

Nor would such a result be limited to the police. Over 175,000 city employees have their salaries, assignments and other working conditions fixed administratively. Rejected demands for salaries, privileges, benefits or other working conditions could, even more easily, in such a case be transferred for decision to the electorate by the mere device of framing as a "charter amendment" a curtailment or limitation on the manner in which the public officials may exercise their administrative discretion as to each or any particular matter which may be the subject of employee dissatisfaction.

In a complex city of 8 million people, the initiative would then become an instrument for the production of the very evil which its original advocates hoped it would cure, i.e. legislation in the interest of special groups or classes.

Matters of administration, unlike those relating to fundamental structural law, frequently have a direct effect on special or vested interests, particularly in large cities.

As Professor Bromage states (*op. cit. infra,* at p. ~~42~~ 39):

> "In theory, direct democracy provides the antidote to representative democracy; in practice, unforeseen problems have arisen, especially with the increase in size of cities and with reliance on the media of communication. Presumably the originators of these progressive ideas did not foresee how the development of interest groups and special pleaders, the use of irrelevant and misleading information, and the sheer numbers of propositions could affect 'pure' democracy. *It is a far cry from the New England town meeting to direct democracy in a large city."* (Emphasis added.) (p. 195)

Furthermore, decision-making in matters of administration, particularly in an urban unit like the City of New York, requires specialized knowledge and experience and an opportunity for hearing, debate and compromise. These elements are completely lacking in initiative.

"The fundamental and inherent defect of all schemes of direct legislation precludes the opportunity for preliminary debate, correction, amendment and modification, and eliminates the salutary influence of the minority in molding and modeling the measures. The proposed law is prepared by interested persons, and when launched and set afloat is a completed thing which must be accepted or rejected as a whole." Carey, Charles H., *Limitations on the Use of Initiative and Referendum. Case and Comment V. 23,* pp. 353-357 (1916).

Experience also shows that fewer voters at an election cast their votes on propositions than on candidates. Therefore, most measures are actually passed by a minority of those voting at the election, rather than by a majority. Thus, "a decision which passes off for the will of the majority of the voters often represents in reality the judgment of the minority among them which happens to be immediately interested in the questions." Munro, William Bennett, *The Initiative, Referendum and Recall,* D. Appleton and Co. (NY 1912) p. 32.

"Where vested interests are concerned, measures that are legislative in form are very often adjudicative in effect. To hinge their acceptance or rejection upon the issue of an election is accordingly, to establish, in many cases a system of administrative adjudication by popular caprice." *Munro,* op. cit., p. 38.

" * * * The expressed wish of the people does not necessarily represent their deliberate judgment * * *" id. p. 39.

"Voters must accept or reject a submitted measure. There is no room for compromise, yet compromise has pledged a large part in the making of laws under the representative system. Without it, progressive legislation would often have proved impossible. To ask voters for an unqualified yea or nay is to disregard the fact that many of them do not hold unqualified opinions and cannot fairly express their views in categorical form." Id., p. 40.

See also, Bromage, Arthur, *"Direct Democracy: Consensus or Chaos?", Colorado Municipalities* (July, 1966) p. 180.

The very local laws proposed here demonstrate the need for the deliberative legislative process in the formulation of administrative provisions which is missing from initiative.

While purporting to deal with the narrow question of the composition of an advisory review board, the proposed local laws raise serious unanswered problems which probably did not enter the minds of the sponsors and which cannot be ironed out in a popular vote.

For example, both proposals are so vague and ambiguous as to encourage future litigants to raise the following issues among others:

Local Law A (Subd. d of §440) prohibits penalizing a member of the police department for failing to respond to the inquiries of any person, agency, board or group appointed by the Mayor, the Commissioner or any other administrator or officer of the City to receive, investigate, hear, or require or recommend action on civilian complaints against members of the police department.

Local Law B (§434) prohibits establishment or maintenance of a "board" for the review of civilian complaints by the Commissioner "or by any other officer of the City of New York" unless each member is a deputy police commissioner.

Would these provisions prevent a Mayor or a Commissioner of Investigations from investigating conduct at the highest levels of the police department by establishing a board or committee of his own assistants, if he had probable cause for belief as to the existence of corruption?

Would they bar a committee of the City Council from its power to do the same?

Would a member of the police department be excused from appearing before or responding to inquiries from appointees of the Comptroller and the Corporation Counsel in an investigation of a claim against the city arising out of misconduct of a member of the police department?

Would the local laws justify a member in refusing to respond to inquiries by the Commission on Human Rights in a complaint of discrimination by a police officer, or by the Department of Personnel in connection with its investigation of a police officer's qualification for promotion, or by the Board of Elections in connection with complaints of misconduct by policemen on election duty?

If the proposed local laws were to be enacted by the legislative body, all of these inadvertent collateral effects or questions would be raised and debated, at public hearings, in legislative committees chosen for their special knowledge and experience, and on the floor of the chamber. The legislative body would have the benefit of written communications and opinions from private and public sources. The above cited inconsistencies, and inadvertent inclusions or omissions would be analyzed and corrected, and deliberation and sober second thoughts would result in modification and compromise permitting the emergence of a method of administration representative of the general public interest rather than one limited to the interest of a special group.

E. Court decisions confirm the conclusion that the proposed local laws are not in fact Charter amendments within the meaning of Municipal Home Rule Law §37.

1. *Astwood* v. *Cohen*

The conclusion that Local Laws A and B, in fact, amend the administrative Code and General Order No. 14, and *not* the Charter, and are therefore *not* proposals to which the Municipal Home Rule Law applies, is confirmed by the decision of the Court of Appeals in *Matter of Astwood* v. *Cohen* (*supra,* p. 7).

In the *Astwood* case, the Court held that a proposed local law adding provisions to the police chapter of the

Charter providing for the payment of a salary bonus to New York City policemen and firemen, though designated as an amendment to the New York City Charter, was not, in fact, a charter amendment within the meaning of former City Home Rule Law §19-a (the predecessor section of Municipal Home Rule Law §37). The Court therefore concluded that the proposal could not be enacted by the initiative and referendum procedure provided therein.

The Court based its decision on an examination of "the nature of the proposed local law and its relation to the provision of * * * [the] *particular* city charter". (Emphasis added.) In *Astwood* as in the instant case, the "particular city charter" was the New York City Charter.

The Court reviewed the history of the New York City Charter and the Administrative Code and concluded that "the legislature has sharply distinguished between the Charter of the City and the Administrative Code" (291 N. Y. at p. 488); and "that New York City since January 1, 1938 has been governed by a short form Charter, setting forth the structure of the city government and the manner in which it is to operate, which was adopted by the voters of the city, and by an Administrative Code which was enacted by the Legislature as a codification and restatement of existing law 'in harmony with and supplemental to the New York city charter'." (291 N. Y. at p. 489).

Applying the "statutory test", the Court then related the proposed law "to the short form Charter of the City of New York" in order to "determine whether the law is in truth an amendment of the charter or is merely labeled as such."

In relation to the short form Charter of the City of New York, the Court found that proposed local law in fact was not a charter amendment. The Court said:

> "The proposed local law in fact amends nothing in the Charter and the provisions of law which are amended are found in the Administrative Code—those relating to policemen in section 434a-10.0 and those relating to firemen in section 487a-8.0. Granting a salary bonus to city employees is quite unrelated to any provision of the New York City Charter and the grant proposed in no sense alters or changes any provision contained in the Charter. * * *"
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> * * *
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> Except as provided in the Charter or by statute, the power to fix all salaries was vested in the Board of Estimate (§67). However, salaries fixed by statute may be increased by local law, provided the local law is approved by the Board of Estimate (§39). *These careful provisions were quite obviously designed to transfer to the Board of Estimate the administrative duty of fixing compensation to be paid to employees by the city.* Inherently, the duty is administrative.
>
> The proposed local law changes none of these provisions relating to salaries contained in the City Charter. * * * *The power of the Board of Estimate as defined in the Charter remains unchanged, as does the power of the City Council, with the approval of the Board of Estimate, to amend the Administrative Code by increasing the salaries of policemen and firemen.* In a word, the proposal is totally to ignore the existing law and with complete independence thereof to

> award a bonus to employees of the city by popular vote. The only law proposed to be amended is the Administrative Code, which was enacted by the Legislature and *which may only be amended as provided by section 39 of the City Charter or by the Legislature itself.* * * *'' (Emphasis added.)

In the present case, as in *Astwood,* the Charter provision conferring ''cognizance and control'' over administration and discipline would remain unchanged; as would also the power of the local legislative body to amend the Code to provide the particular methods of administering or disciplining the department. Here, as in *Astwood,* the proposals seek in fact to amend the Administrative Code, by providing a particular method for carrying out one aspect of such administration and discipline; and here, the conclusion in *Astwood* is squarely applicable, namely, that the Administrative Code provisions as to the methods of exercising administration and discipline can only be amended by local law as provided by Charter §27 or by the State Legislature itself.

In *Astwood* the Court went on to construe the effect of former §19-a (the predecessor of M. H. R. L. §37) on the following three gradations of municipal law applicable to the New York City government: namely, charter amendments, local laws enacted in ordinary course by the local legislative body without charter amendment, and administrative action which may be taken without legislative authority or approval (291 N. Y. at pp. 490-491). The Court concluded that if a New York City charter amendment is required to be distinguished from an ordinary legislative enactment for purposes of determining whether initiative and referendum may be used under Municipal Home Rule Law §37, even more clearly, then, must it be distinguished from administrative action which may be taken without legislative authority or approval. If a local law which can be adopted in the ordinary course without amending the short-form New York City Charter cannot be a "charter amendment" under the initiative procedure, it follows *a fortiori* that an administrative regulation which can ordinarily be adopted without legislation, could not possibly be regarded as such a charter amendment. Thus the Court said:

> "Section 19-a restricts the use of the initiative and referendum to Charter amendments as distinguished from local laws which are enacted in ordinary course by the legislative body in the regulation of the city's affairs without amendment of the Charter. Even more clearly, administrative action which may be taken without legislative authority or approval was not intended to be taken by direct action of the voters. The test of validity in every case is whether the local law is in truth and in fact an amendment of a city charter. (*Matter of Maylender* v. *Morrison,* 260 App. Div. 892, affd. 284 N. Y. 575; *Matter of Steinberg* v. *Meisser,* 291 N. Y. 685). The tradition of representative democratic government is too strong to permit an inference that the Legislature intended to extend the exceptional process of direct legislation to details of administration unrelated to amendments of the Charter, whether regulated by local laws and ordinances or managed by responsible administrative agencies. (*Matter of McCabe* v. *Voorhis,* 243 N. Y. 401, 413.)"

Thus, the relationship of the proposed local laws to the Charter, in the instant case, is squarely analogous to the relationship of the proposed local law to the Charter in the *Astwood* case. Here, the Charter even more expressly than in the *Astwood* case, discloses an intent to omit completely from its scope provisions regulating the administration of the disciplinary process and to leave the government of that process to the detailed Administrative Code and the rule-making power of the Commissioner.

Like the *Astwood* situation, the Charter in the instant case vests broad and general administrative power in the Police Commissioner (§434), but also vests power in the local legislative body to change the administrative procedures *by local law* in order *"to effectuate the purposes and provisions of this charter* or of other laws relating to the city." Charter §27 subd. a. As in the *Astwood* case, the exercise by the electorate, in the instant case, of the function of determining what kind of a board the Commissioner will utilize to advise him,—a function ordinarily exercised by the administrative official himself or by the local legislative body without amending the Charter, is distinguishable from and cannot possibly be deemed an amendment of the New York City short-form Charter.

In view of the foregoing, in the instant case, even more clearly than in *Astwood,* the proposed local laws are amendments of the Code and the Police Commissioner's administrative regulations, and are not amendments of the Charter, within the meaning of Municipal Home Rule Law §37.

2. The *Astwood* case has been followed by the Courts up to the present date.

Subsequent judicial decisions have followed the *Astwood* rule by applying its statutory test of a "charter" amendment: i.e., the test of a charter amendment is to be based not on any "generalization" but by relating the proposed local law to the *particular* city charter. *Matter of Warden* (*Newburgh Police Dept.*, 300 N. Y. 39 (1949); *Hacker* v. *Common Council of City of Ithaca*, 49 Misc. 2d 69, 266 S. 2d 927 (Sup. Ct. Tompkins County 1966). In each of the cited cases, the actual *decision* differed from that of the *Astwood* case because of the fact that the *particular* city charter under consideration differed from the New York City Charter. Thus, in each of the cited cases, the "particular charter" was a long form charter which included organic provisions *and* administrative regulations. It was therefore held that an administrative amendment was not "wholly alien to the text" of the particular long-form charter containing organic law *and* administrative detail. *Warden,* supra, 300 N. Y. at p. 42; *Hacker,* supra, 266 S. 2d at p. 932.

a. The Warden case

Thus, in *Warden,* supra, 300 N. Y. at p. 42, the Court restated and followed the principle of the *Astwood* case, but distinguished the facts in the *Astwood* case from the facts in the case before it, as follows:

> "He relies in the main upon our decision in *Matter of Astwood* v. *Cohen* (291 N. Y. 484), a case in which we were called upon to determine the validity of a referendum petition filed pursuant to section 19-a of the

> City Home Rule Law. The local law there proposed would have provided a bonus to the policemen and firemen of the city of New York. *In that city, however, the salaries of the policemen and firemen were then and are now fixed by an administrative code and not by any charter provision.* In the *Astwood* case (*Supra,* pp. 488, 489) this court in 1943, held the chief question to be whether "the proposed law is in truth an amendment of the Charter or is so far unrelated to he Charter as to be an amendment only in name * * * In applying the statutory test to the proposed local law we must relate the law to the short form Charter of the City of New York and determine whether the law is in truth an amendment of the Charter or is merely labeled as such." Under that test, this court in the *Astwood* case rejected the local law there in question.
>
> *But the Charter of the City of Newburgh is no mere skeleton or framework of governmental structure like the Charter of the City of New York.* The Newburgh Charter contains many provisions in respect of such matters as assessments and local taxes, the operation and control of public works, the supply of water and charges therefor, and the organization and regulation of the police and fire departments. *Furthermore, the City of Newburgh has no administrative code such as was enacted to harmonize with the shortform Charter of the City of New York. In a word, the Astwood case (supra)* affords no solution of the *first issue here presented.* (Emphasis added)

Since the "controlling facts" of the *Astwood* case and the *Warden* case were basically different, in that the Charter in the *Warden* case was a *long* form charter in which fundamental law was intermingled with administrative detail, the Court in *Warden* sought an answer to the question before it in the 1944 amendment to Municipal Home Rule Law §37.

The 1944 amendment to that section (L 1944 c 602) retained the basic statutory test in determining whether a local law could be submitted as an initiative measure, i. e. whether it amends a city charter. However, the amendment made the section applicable to a local law "amending a city charter, *however extensively*" (*supra,* p. ....).

In *Warden,* the Court found that in the light of this new language the proposed local law before it was "not wholly alien to the text *of the Charter of the City of Newburgh.*" Thus, the Court recognized that even under the 1944 amendment, the statutory test formulated in *Astwood,*—namely, that the proposed local law must be related to the *particular* city Charter to determine whether it is in fact a charter amendment,—was retained and continued by the 1944 amendment.

Consistently with this recognition, the Court also stated explicitly:

> "Whether the above 1944 amendments to the City Home Rule Law permit additions to a *short* form charter of matters unrelated to existing provisions thereof is a question which *is not here presented.*" (Emphases added.)

As already indicated, *supra,* p. 32, this question dismissed by the Court in *Warden,* was subsequently answered by the State Legislature when it enacted L. 1957 ch. 1027. That Act makes it clear beyond question that the 1944 amendment did not change the holding of the *Astwood* case that matters which are not within the scope of the short form New York City Charter, but which properly belong in the Administrative Code, may not be made the subject of initiative under Municipal Home Rule Law §37.

Thus, the legislative note appended to L1957 ch. 1027 (set forth in 1957 Session Laws of N. Y. p. 2186) lucidly explains that there has been only one basic change in the *scope* of the legislative initiative power, namely the extension of the process to a local law adopting a *new* charter, as well as to one *amending* a charter; and that the addition of the words "however extensively" in the 1944 act were intended solely to permit amendments which are so extensive as in effect to constitute a new charter. The text of 1957 legislative note reads as follows:

> "Note.—The addition of a new charter to the scope of this section is not an extension of the intended coverage of the section but a clarification to avoid unintended limitations by court decision. The legislature often adopts complete revisions of laws as measures to amend such laws generally. Despite this precedent, in 1940 a proposed extensive revision of a city charter presented in amendment form, was thrown out by the courts as in fact not an amendment but a new charter (Maylender v. Morrison, 1940, 200 App. Div. 892, 22 N. Y. S. 2d 555, affirmed 284 N. Y. 575, 29 N. E. 2d 395). In 1944 the legislature sought to overcome this decision by inserting the words 'however extensively' after 'amending a city charter' in the paragraph above, and some extensive charter revisions have been adopted under the provisions of this section since that time. However, in 1945 a court held that this amendment left unchanged the distinction between the adoption of a new charter and adop-

tion of amendments, though amendments may be extensive as well as numerous (Application of Grenfell, 1945, 185 Misc. 558, 57 N. Y. S. 2d 284). It is now proposed to authorize the adoption of a new charter so that an extensive revision may for convenient use reproduce an entire charter with the proposed changes, as did the proposal invalidated in the Maylender case, without running the danger of being disqualified as a new charter rather than an amendment. The requirement of amendment form, indicating new matter and matter to be omitted so that voters may understand what changes are proposed, is being preserved (see subdivision 2 below)."

It is noteworthy that the *Astwood* case is *not* among the cases cited in the legislative note as being or having been intended to be overruled by the amendatory legislation.

In the *Warden* case the objecting taxpayer raised a second question not dealt with in the *Astwood* case; namely, whether City Home Rule Law §19-a, in and of itself intended to exclude the use of initiative for administrative as distinguished from legislative action. The Court stated that the 1944 amendment" made such a distinction entirely inadmissible as a reason for invalidating a *charter amendment* proposed to be made by local law." (Emphasis added.) (300 N. Y. 43)

However, this statement must be interpreted in the context of the *"controlling facts"* before the Court: The "charter amendment" in *Warden* amended a long form charter containing fundamental powers and administrative detail. As to such a charter, there is no distinction between legislative and administrative action.

The *Warden* statement must also be read in the context of the Court's statement (*supra,* p. 49) that the effect of the 1944 amendment on a short form charter "is not here presented."

It is apparent from the foregoing that the *Warden* case affirmed the principles of the *Astwood* case and established the additional principle concerning administrative amendments only in respect to a *long-form* charter.

b. The Hacker case

In *Hacker, supra,* the Supreme Court (Special Term, Tompkins County) followed the *Astwood* method of applying the statutory test to determine whether a proposed initiative measure was in fact a Charter amendment under Municipal Home Rule Law §37 266 N. Y. at pp. 932-933.

There, a taxpayer objected to the use of initiative for a proposed local law purporting to amend the Ithaca City Charter by prohibiting the Common Council from authorizing fluoridation of the public water supply. The Court upheld the right to adopt the proposal by initiative and referendum on the ground that the Ithaca Charter was "no mere skeleton or framework of governmental structure" like the City of New York City Charter, but was rather a long form charter containing both fundamental and administrative regulation and detail. 266 N. Y. S. 2d at p. 932.

F. Experience under Municipal Home Rule Law §37 has demonstrated the wisdom of the *Astwood* rule of applying the statutory test.

The *Astwood* rule of applying the statutory test under Municipal Home Rule Law §37 takes cognizance of an implicit legislative recognition that differences exist among cities by reason of the size of their populations, the form of their governments, and other factors of varying degrees of complexity, and that the forms of their city charters bear a direct relationship to these differences. Thus, Newburgh (involved in *Warden*) had in 1940 and continued to have, in 1960, a population of 30,000. Ithaca, (involved in *Hacker*) had a population of 28,799 in 1960. In a city of such a size, a long-form charter combining fundamental and administrative detail presents no real problem. Moreover, under their charters, each of these cities has a form of government in which the legislative and executive powers are vested in the same officials.* Therefore, their omission to make any distinction in their charters between fundamental charter law and administrative detail can be regarded as intentional, since a broader scope of initiative is desirable to make up for the lack of checks and balances that would be present if the legislative and executive powers were not vested in the same officials.

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* See Newburgh Charter L. 1917 ch. 590, §§8, 16 and 53, and Ithaca Charter L. 1908 ch. 503, §§15, 28. In Newburgh, the Mayor is presiding officer of the Common Council and the Common Council appoints the City Manager who is the chief adminstrative official. In Ithaca, the Mayor is the presiding officer of the Common Council and also appoints the administrative officials.

Thus, by interpreting the limitation in Municipal Home Rule Law §37 as dependent for its scope upon the form and scope of the particular city charter, the Legislature has made it possible to give to initiative a role in the government of cities realistically adapted to the needs of each city.

For obvious reasons, the considerations which make a broad initiative power desirable in a city of 20,000 or 30,000 inhabitants cannot possibly apply to a city of 8 million. Thus, the *Astwood* rule wisely and effectively prevents the application to a city of 8 million people, of a principle of government which might be deemed appropriate for a city of 30,000.

POINT II

The *Monplaisir* petition does not have a sufficient number of valid signatures to entitle it to consideration under Municipal Home Rule Law §37.

Under the provisions of §37 of the Municipal Home Rule Law a petition to amend the City Charter by the initiative and referendum procedure in the City of New York must contain the signatures of a minimum of 30,000 qualified electors.

§37 of the Municipal Home Rule Law subd. 2, thereof provides in part that:

> "* * * Qualified electors shall be deemed for this purpose to be voters of the city who were registered and qualified to vote in such city at the last general election preceding the filing of the petition."

The qualifications of voters are set forth in Election Law §150.

The City Clerk in the performance of the duties enjoined upon him pursuant to §37 of the Municipal Home Rule Law caused the petitions to be examined and compared the names thereon with the official lists of qualified voters, published by the Board of Elections, to determine whether or not the persons whose names appear in the petitions were registered and qualified, pursuant to §150 of the Election Law, to vote in the last general election preceding the filing of the petitions. The results of this examination revealed, as indicated in the Certificate of the

City Clerk annexed to the answer, that the *Monplaisir* petition did not contain a sufficient number of valid signatures to qualify it for the purpose of initiating an amendment to the City Charter.

CONCLUSION

It has been demonstrated that: (1) the proposed local laws are not charter amendments within the meaning of Municipal Home Rule Law §37 and therefore may not be adopted pursuant to that section; and (2) the *Monplaisir* petition does not contain a sufficient number of valid signatures as required by §37.

Therefore, the applications and the relief demanded by the applicants in each proceeding herein should be denied; the applications should be dismissed; and judgment should be entered in favor of respondent declaring and adjudging that the proposed local laws do not comply with all requirements of law and may not be submitted to the electorate pursuant to the provisions of Section 37 of the Municipal Home Rule Law.

Respectfully submitted,

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APPENDIX

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Appendix

The Proposed Local Laws

cal Law A (*Cassese* Application) reads as follows:

"A Local Law to amend the New York City Char- r, in regard to the establishment of a procedure for ndling civilian complaints against members of the lice department.

40. Civilian Complaints Against Members of the olice Department.

(a) Policy. It is hereby declared to be the public licy of the City of New York in order to preserve e independence and integrity of police service, that vilian complaints against members of the Police epartment of the City of New York shall be inves- gated and dealt with fully and fairly by the appropri- e officials regularly charged with the governance and iscipline of the Police Department without inter- rence by any person or group of persons not regu- rly in police service.

(b) Definitions. As used in this section:

1. The term "Mayor" means the Mayor of the City f New York or any official acting on his behalf or in is place and stead.

2. The term "Commissioner" means the Police ommissioner of the City of New York or any official cting on his behalf or in his place and stead.

3. The term "Police Department" means the Pol- e Department of the City of New York.

4. The term "civilian" means any person who is ot a member or full-time employee of the Police epartment.

(c) Review of civilian complaints. The Commissioner shall have the power to and may establish within the Police Department, a review board, to consist of one or more persons, who shall serve at his pleasure, which board may have the power to receive, to investigate to hear and to recommend action upon civilian complaints against members of the Police Department, or any one or more of such powers, provided that each member of such board is, and for a period of at least one year prior to his appointment to such board has been, a regularly appointed full-time member or full-time administrative employee of the Police Department and shall continue to be a full-time member or full-time administrative employee of the Police Department during his period of service on such board. Neither the Mayor, the Commissioner, nor any other administrator or officer of the City of New York shall have power to authorize any person, agency, board or group to receive, to investigate, to hear, or to require or recommend action upon, civilian complaints against members of the Police Department except as provided in this section.

(d) Attendance by police officers. No member of the Police Department or other person shall be disciplined or otherwise penalized for his failure to appear before or respond to the inquiries of any person, agency board or group appointed by the Mayor, the Commissioner, or any other administrator or officer unless such person, agency, board or group shall be duly appointed in accordance with the provisions of this section.

(e) Prosecution; right to hearing. Notwithstanding anything herein contained to the contrary, this section shall not be construed to prevent investigation or prosecution of members of the Police Department for violations of law by a duly constituted court having jurisdiction, a grand jury, district attorney or other law enforcement agency; nor shall this section be construed to permit a member of the Police Department to be fined, reprimanded, removed, suspended, or dismissed, except upon written charges, after such charges have ben examined, heard and investigated by the Commissioner, one of his deputies or the assistant to the Commissioner.

(f) Separability. The invalidity of any provision or provisions of this section shall not affect the validity of the remaining provisions thereof, but such remaining provisions shall continue in full force and effect.

Section 2. This local law shall take effect immediately."

Local Law B (*Monplaisir* Application) reads as follows:

"A Local Law

To amend the New York City Charter in relation to the disciplinary procedures of the New York City Police Department, prohibiting the creation or maintenance of a civilian complain review board composed of members who are not deputy police commissioners.

Be it enacted by the People of the City of New York, pursuant to the authority granted in section thirty-seven of the Municipal Home Rule Law, as follows:

Section 1. Subdivision a of section four hundred thirty four of the New York City Charter, adopted by the People of the City of New York at the general election held November 7, 1961, is hereby amended to read as follows:

§434. Commissioner; powers and duties.

a. The Commissioner shall have cognizance and control of the government, administration, disposition [and discipline], *discipline and disciplinary procedures* of the department, and of the police force of the department [.] *provided, however, that no board for the review of civilian complaints against policemen who allegedly have abused their authority or used unnecessary force may be established or maintained by the commissioner or by any other officer of the City of New York, unless each member thereof is a deputy commissioner appointed pursuant to section four hundred thirty-two of this charter.*

Section 2. This local law shall take effect January first, nineteen hundred sixty-seven, subject to prior approval by the electors of the city at the general election to be held on the eighth day of November in the year nineten hundred sixty-six."

Appendix

Relevant Municipal Home Rule Provisions

Municipal Home Rule Law §37 subdivision 1 provides:

> "1. A local law *amending a city charter* (however extensively) or providing a new city charter, also may be adopted in accordance with the provisions of this section." (Emphasis added.)

Section 37 further sets forth an initiative and referendum procedure for the adoption of such a local law.

Municipal Home Rule Law §2 subds. 1, 2 and 10 provide as follows:

> "§2. Definitions
>
> As used in this chapter the following terms shall mean or include:
>
> 1. 'Charter.' A state statute or a local law which establishes or continues a specific county, city or village as a municipal corporation or body politic and includes the fundamental provisions defining, extending or limiting its corporate powers or affecting the framework of its government.
>
> 2. 'Charter amendment.' A new charter or any change in an existing charter presented as such under authority of this chapter or any state statute or charter. A charter amendment may be of any extent and may deal with any number of subjects.
>
> 10. 'New charter.' A charter which supersedes or repeals an existing charter in its entirety or in the manner provided in subdivision four or subdivision five of section thirty-six of this chapter.

Relevant Charter Provisions

Charter §434 provides as follows:

"Commissioner; Powers and Duties

"§434. a. The commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department.

b. The commissioner shall be the chief executive officer of the police force. He shall be chargeable with and responsible for the execution of all laws and the rules and regulations of the department."

Relevant Administrative Code Provisions

Administrative Code §434a-14.10 provides as follows:

"§434a-14.0. Discipline of members.—a. The commissioner shall have power, in his discretion, on conviction by him, or by any court or officer of competent jurisdiction of a member of the force of any criminal offense, or neglect of duty, violation of rules, or neglect or disobedience of orders, or absence without leave or any conduct injurious to the public peace or welfare, or immoral conduct or conduct unbecoming an officer, or any breach of discipline, to punish the offending party by reprimand, forfeiting and withholding pay for a specified time, suspension, without pay during such suspension, or by dismissal from the force; but no more than thirty days' salary shall be forfeited or deducted for any offense. All such forfeitures shall be paid forthwith into the police pension fund.

b. Members of the force, except as elsewhere provided herein, shall be fined, reprimanded, removed, suspended or dismissed from the force only on written charges made or preferred against them, after such charges have been examined, heard and investigated by the commissioner, one of his deputies or the assistant to the commissioner, upon such reasonable notice to the member or members charged, and in such manner or procedure, practice examination and investigation as such commissioner may, by rules and regulations, from time to time prescribe.

c. The commissioner is also authorized and empowered in his discretion, to deduct and withhold salary from any member or members of the force, for or on account of absence for any cause without leave, lost time, sickness or other disability, physical or mental; provided, however, that the salary so deducted and withheld shall not, except in case of absence without leave, exceed one-half thereof for the period of such absence; and provided, further, that more than one-half pay for three days shall be deducted on account of absence caused by sickness.

d. Upon having found a member of the force guilty of the charges preferred against him, either upon his plea of guilty or after trial, the commissioner or the deputy examining, hearing and investigating the charges, in his discretion, may suspend judgment and place the member of the force so found guilty upon probation, for a period not exceeding one year; and the commissioner may impose punishment at any time during such period."

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POLICE DEPARTMENT

SEC. 270. Police commissioner; salary; deputies; salaries, etc.
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277. Id.; members of former forces in New York city transferred.
278. Id.; members of former forces in Brooklyn transferred.
279. Id.; members of former force in Long Island City transferred.

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280. Id.; members of former force in Richmond county transferred.
281. Police commissioner; authority over members transferred by preceding sections; rank of transferred members.
282. Id.; authority over employes of former boards; duties and salaries of such employes.
283. Id.; power to appoint and remove members and employes; salaries and fines.
284. Police force; qualifications of members; publishing names and residence of applicants and appointees.
285. Id.; warrant of appointment; oath.
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290. Id.; detective bureau.
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297. Payment of salaries and obligations of department.
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299. Salaries of officers and members of force.
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Sec. 308a. Id.; Emergency police.

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311. Police force; arrests for violation of health laws.
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361. Terms of office; removal; salaries.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---x

In the Matter of the Application of

MARIA E. MONPLAISIR,
MICHAEL J. YORKE and
LARS EKWURZEL,

Petitioners,

- against -

Index No
12121/66

HERMAN KATZ, City Clerk of the City of New York,

Respondent,

For an order pursuant to Section 37 of the Municipal Home Rule Law, declaring valid the petition heretofore filed with the City Clerk of the City of New York and directing the City Clerk to transmit his Certificate that the petition complies with the requirements of law to the Council of the City of New York.

---x

PETITIONERS' MEMORANDUM

JAMES J. LEFF
ATTORNEY AT LAW
36 WEST 44TH STREET
NEW YORK, N. Y. 10036

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
---x

In the Matter of the Application of

MARIA E. MONPLAISIR,
MICHAEL J. YORKE and
LARS ERKWURZEL,

Petitioners,

- against -

Index No.
12121/1966

HERMAN KATZ, City Clerk of the City of New York,

Respondents

For an order pursuant to Section 37 of the Municipal Home Rule Law, declaring valid the petition heretofore filed with the City Clerk of the City of New York and directing the City Clerk to transmit his Certificate that the petition complies with the requirements of law to the Council of the City of New York.

---x

PETITIONERS' MEMORANDUM

I

THE JURISDICTION OF THE COURT OVER THESE PROCEEDINGS

This is a proceeding authorized by Municipal Home Rule Law §37 which provides, in part, that:

> ". . . A finding by the city clerk that a petition does not comply with all the requirements of law may be contested in a proceeding in the supreme court."

Municipal Home Rule Law §37 Subdivision 5 provides, in part, that:

> "5. Such petition shall conform to the provisions of section twenty-four of this chapter in relation to petitions. It shall be examined and reported on by the city clerk as prescribed therein, and objections thereto shall be disposed of by the supreme court as prescribed by such section. . . ."

Municipal Home Rule Law §24, in part, provides:

> ". . . The petition may be made upon separate sheets, and the signatures to each sheet shall be signed and authenticated in the manner provided by the election law for the signing and authentication of designating petitions so far as applicable. The several sheets so signed and authenticated, when fastened together and offered for filing, shall be deemed to constitute one petition. The clerk shall examine each such petition so filed with him and shall not later than thirty days after the date of its filing, transmit to the legislative body a certificate that he has examined it and has found that it complies or does not comply, as the case may be, with all the requirements of law. If within thirty days after the filing of such a petition a written objection thereto be filed with the supreme court, or any justice thereof, of a judicial district in which such local government or any part thereof is located, such court or justice shall determine any question arising thereunder and make such order as justice may require. Such pro-

> ceeding shall be heard and determined in the manner prescribed by section three hundred thirty-five of the election law."

Election Law §335 provides:

> "§335. Procedure
> A special proceeding under the foregoing provisions of this article shall be heard upon a verified petition and such oral or written proof as may be offered, and upon such notice to such officers, persons or committees as the court, justice or judge shall direct, and shall be summarily determined. The proceeding shall have preference over all other causes in all courts."

II

THE CITY CLERK'S CERTIFICATION IS ERRONEOUS BOTH AS TO PART I AND PART II.

The petition filed by Maria E. Monplaisir, Michael J. Yorke and Lars Erkwurzel was examined by the City Clerk for the purpose of certifying pursuant to §37 of the Municipal Home Rule Law. For the reasons assigned in his certificate the City Clerk has found that the petition does not meet the requirements of law and that it does not contain a minimum of 30,000 valid signatures. The petitioners submit that the certificate is erroneous in respect to both assertions. The petitioners further submit that with respect to the signature requirement the City Clerk's finding is a nullity because he has failed to examine the petition as required by law and in such a manner as would make it possible to properly to ascertain whether or not the signatures appearing on the petition are, in fact, valid signatures.

The City Clerk's certificate concedes the validity of 22,151 signatures. The certificate asserts that the remaining 18,142 signatures on the petition are invalid. Invalidity is asserted, without breakdown in the certificate, to be based on signatures of persons who are purportedly not qualified electors and of signatures of persons whose signatures appear on sheets subscribed to before persons not qualified to act as subscribing witnesses. If the 22,151 qualified electors who signed the petition were in fact joined in executing this petition by 7,849 other signators out of the remaining 18,142 asserted to be invalid, who are in fact qualified, then the City Clerk has deprived all the qualified signers of this petition of a valued privilege and a constitutional right. For the reasons set forth petitioners maintain that the petition was illegally examined.

A) As to the Proper Signature Procedure.

Potash v. Molik, 35 Misc. 2nd 1, 230 N.Y.S. 2d 544, was a proceeding to review the determination by the City Clerk of the City of Buffalo, who had certified a referendum petition under the then City Home Rule Law §16 to be invalid on the ground that the subject petition contained an insufficient number of valid signatures. The court took the opportunity to enunciate a standard for the form of such petitions and their examination. It said, at 230 N.Y.S. 2nd 554

> "The present matter is probably as good an example as can be found for a court's declaration of a simple form for a protest permissive referendum petition. In the present case, the examiner has determined by applying inapplicable provisions of the Election Law that a petition containing 46,192 signatures has but 11,835 valid signatures, less than twenty-five per cent of the total number of signatures signed to such petition. Certainly the electors of the City of Buffalo should not be deprived of their right to petition their local government by way of referendum by a narrow, restrictive and erroneous interpretation by the examiner of the requirements for a protest permissive referendum petition.
>
> On all the above, it is the opinion of this court that the determination of the respondent determining and certifying that the subject petition does not comply with all the requirements of law pertaining thereto be and the same is hereby annulled in whole The respondent is ordered to withdraw and vacate the certificate filed by him as City Clerk of the City of Buffalo with the Common Council of the City of Buffalo dated March 9, 1962, a copy of which is attached to and made a part of the petition herein.
>
> The respondent is further ordered upon service upon him of a copy of the order to follow, to forthwith publicly commence a re-examination of the petition filed with him in the light of this opinion."

In the instant case petitioners pray for a like declaration vacating the certificate dated August 5, 1966 made by the City Clerk and for an order directing that the City Clerk re-examine the 18,142 claimed invalid signatures by the methods prescribed in the decision of the court in Potash v. Molik, supra, and in accordance with the observa-

tions as to principles and procedures enunciated by the Appellate Division in Potash v. Molik, 17 A.D. 2nd 111, 232 N.Y.S. 2nd 993.

The statute requires only that the signers be "qualified electors of a city" and that they be "registered and qualified to vote at the last general election." (Municipal Home Rule Law §37). It further provides that

> **"The petition may be made upon separate sheets and the signatures to each sheet shall be signed and authenticated in the manner provided by the Election Law for the signing and authenticating of designated petitions so far as applicable." (Emphasis supplied.) (Municipal Home Rule Law §24 Subd. 1)**

In his examination of the petition the City Clerk is required to ascertain whether the signers are in fact qualified electors who were registeeed to vote at the last general election. The statute imposes no duty on the circulators of the petition to provide for the inclusion of any information other than the name and address of the signators. They in fact included the election district and assembly district applicable in 1966 to the signers. In examining the petition the City Clerk limited his examination to a check of the signatures by reference to the printed enrollment books prepared pursuant to Election Law §§80 and 377. No further step was taken by the City Clerk to confirm the qualification of a voter when that qualification could not be confirmed by reference to the printed book. This method was found inadequate in Potash v. Molik,

232 N .Y.S. 2nd 544, where the court said, at 550

> "It is argued by the respondent that such items are necessary and applicable to test the validity of the signatures on the petition. This may be a convenience to the examiner but is nowise a necessity. Given the name and street address, the examiner can readily determine from the records of the Board of Elections whether the signer meets the requirements of eligibility to sign a protest permissive referendum petition. The convenience of the examiner should not weigh in the balance against the right of an elector duly qualified to join in a protest petition and have his name counted on such petition. . . ."

By this method he asserts the invalidity of 18,142 signatures representing persons who have stated under penalties of perjury that they are qualified voters of the City of New York qualified to vote at the next general election in such city and that their places of residence are truly stated opposite their signatures as such signatures appear upon the petition. These individuals have further stated that they were registered and qualfied to vote at the last general election from the addresses they have indicated. 18,142 such avowals are entitled to a respectful and conscientious examination.

Unquestionably the City Clerk will be put to a great deal of work in any instance where a petition is submitted by voters exercising their constitutional right to petition. It is not his province to settle upon a procedure that will enable him to complete his job in the manner he deems least troublesome. If, in fact, a little extra effort will confirm the statements of qualified voters it is incumbent upon him to make such an effort.

The right to petition is such that the individual or body with whom a petition is filed is charged with a solemn duty that cannot be taken lightly.

On November 9, 1669, a petition was presented to the Court of Assizes of the Colony of New York. The petition was signed by representatives of the principal towns. It stated, in substance, that at the surrender of the Province they had been promised all the privileges of His Majesty's other English subjects in America, and they contended that participation in legislation was one of those privileges. The petition was not well received. The court referred it to the governor who considered it a seditious document and ordered it burned by the public hangman. The subject petition is entitled to a more respectful consideration.

It is implicit in the right to petition that a petition will state a grievance. It is further implicit in a petition that the grievance be lodged with a body having the right to redress the grievance. These facts were clearly recognized in the adoption of the Bill of Rights for Local Governments. State Constitution Article IX §1 commences with the statement, "Effective local selfgovernment and intergovernmental

cooperation are purposes of the people of the State." The legislative intent is incorporated in Municipal Home Rule Law §50, reciting that, "It is the intention of the legislature by this chapter to provide for carrying into effect provisions of Article IX of the constitution and the statute of local governments. . ." Municipal Home Rule Law §51 ordains, "This chapter shall be liberally construed."

The City Clerk has failed in his duty. His certificate should be nullified, and he be directed to re-examine the submitted petition in compliance with law.

III

THE PROPOSED LOCAL LAW AMENDS THE CHARTER AND DOES NOTHING ELSE.

Article IX of the State Constitution, approved November 5, 1963, entitled Bill of Rights for Local Governments completely revised and gave constitutional force to municipal home rule. A positive and mandatory duty was imposed upon the legislature in accordance with Article IX, Section 2.

> "§ 2. (a) The legislature shall provide for the creation and organization of local governments in such manner as shall secure to them the rights, powers, privileges and immunities granted to them by this constitution."

Specifically, among the enumerated powers the Constitution conferred upon local governments was a provision Article IX, Section 2, Subdivision (3)(c)(1), empowering them with respect to

> "(1) The powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of its officers and employees, except that cities and towns shall not have such power with respect to members of the legislative body of the county in their capacities as county officers."

Those powers are specifically enumerated in Municipal Home Rule Law §10.

The proposed local law clearly and unequivocally amends Section 434 of the New York City Charter insofar as it changes the powers of the Police Commissioner and affects the "protection, welfare and safety of its officers and employees,". The statute is clear and unambiguous.

The Administrative Code is unaffected. Except for the qualifications of the appointees of the Commissioner, the conduct of disciplinary proceedings is in no respect circumscribed by the charter amendment.

Cassese v. Lindsay, N.Y.L.J. 6/24/66 (not otherwise reported) clearly establishes that the proposed local law is in fact a charter amendment. In his opinion Mr. Justice Murphy said

> "With respect to the four civilians to be appointed by the Mayor to the Civilian Complaint Review Board, the court finds that General Order No. 14, in its present design, is valid. New York City Charter, Section 434 (a) and (b), provides that the Commissioner shall have 'cognizance and control of the government, administration, disposition and discipline of the department', and that he shall be chargeable with and responsible for the execution of all laws and the rules and regulations of the department." Moreover, the Commissioner alone possesses the authority to punish a member of the force for dereliction of duty (Administrative Code, section 434 [a]-14.0).
>
> The unambiguous language contained in the above statutory provisions effectively vests broad administrative power in the Police Commissioner. In pursuit of the duties and obligations imposed upon him by statute, the Police Commissioner has

> apparently determined that the proper control and administration of the Police Department may best be effectuated by resort to a civilian advisory board. No legal obstacle exists which may bar the exercise of the Police Commissioner's discretion. . . ."

The proposed amendment to the Charter specifically would impose such a bar so that the reading given to §434 (a) by the court in Cassese v. Lindsay, supra, would, by the enactment of the proposed local law, change the Charter to affect the powers of the Commissioner. The subject local law proposes to do this and nothing more. Within the meaning of §37, subdivision 1, "A local law amending a city charter ... may be adopted in accordance with the provisions of this section.", the proposed local law is a proper subject for submission to the electors.

As Mr. Justice Murphy said in Cassese v. Lindsay, supra,

> "...It is not the province of any individual, or organization, or, indeed, the court, to dictate to an appointed public official how he may best command his department."

The power belongs to the people who enacted the charter. It is for them to ordain its amendment.

IV

THE RELIEF PETITIONERS
PRAY FOR IN THIS APPLICATION

The question of the validity of the signatures should be disposed of as a Threshhold question before the Court addresses itself to the legal sufficiency of the proposed local law.

If the Court holds the City Clerk's certificate to be defective and orders him to re-examine the petition, and if on such re-examination it be then determined that the petition lacks sufficient valid signatures, the Court will not need to address itself to the question of the petition's legal sufficiency.

Since a second petition is required to be filed under Municipal Home Rule Law §37, it is respectfully suggested that this Court nullify the City Clerk's certificate, order the petition re-examined and that such order be without prejudice to the rights of the parties to have the issue of legal sufficiency determined upon the second filing.

Respectfully submitted,

JAMES J. LEFF
Attorney for Petitioners.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- x

In the Matter of the Application of

AMELIA CASSESE,

Petitioner,

-against-

HERMAN KATZ, as City Clerk of the City of New York,

Respondent.

For an order pursuant to Section 37 of the Municipal Home Rule Law and Article 78 of the Civil Practice Law and Rules.

- x

PETITIONER'S BRIEF

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
COUNSELORS AT LAW
1501 BROADWAY
NEW YORK

CASSESE v. **KATZ**
Petitioner's Brief

Argument: The petitions comply with law.

1. Lindsay case showed that Leary derived power to establish board from S.434 of charter and therefore that the topic is within the general structure of the charter and therefore that the proposed amendment is proper.
   a. §37 permits charter amendments "of any extent" which "deal with any number of subjects"
2. Petition complies with MHRL S.2(2) since it is an "amendment" within the definition given; the definition makes no requirement that it comply with the "basic structure" of the charter.
3. Maylander and Astwood cases have been overruled by the 1944 amendments to MHRL, S.2 and 37. The minority opinion in Astwood has really prevailed. Two letters from legislators at time of 1944 amendments quoted to show intent of amendments to limit Astwood. (weak!).
4. MHRL definitions make~~s~~ no distinction between long and short form charters in its provisions. °under Warden. Warden impliedly if not expressly overrules Astwood.
5. Even if Astwood were not defunct, this would still be proper amendment since there are other provisions in the charter for advisory boards such as the one proposed: S. 84,227,582-a,584,626,910.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

--------------------------------------x

In the Matter of the Application of

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Petitioner's Brief

STATEMENT

This proceeding pursuant to Section 37 of the Municipal Home Rule Law and Article 78 of the Civil Practice Law and Rules was brought on by order to show cause directed to the City Clerk of the City of New York. The proceeding seeks to validate a referendum petition filed with the City Clerk on July 7, 1966 and to require the City Clerk to certify to the City Council of the City of New York that said petition complies with all the requirements of law.

FACTS

On July 7, 1966 petitioner filed with the City Clerk of the City of New York, a referendum petition (a copy whereof is annexed to the petition in this proceeding) pursuant to Section 37 of the Municipal Home Rule Law, seeking to enact a local law amending the New York City Charter. The proposed local law enacts a new Section 440 of the City Charter authorizing the Police Commissioner of the City of New York to :

> "establish within the Police Department, a review board, to consist of one or more persons, who shall serve at his pleasure, which board may have the power to receive, to investigate, to hear and to recommend action upon civilian complaints against members of the Police Department, or any one or more of such powers, provided that each member of such board is, and for a period of at least one year prior to his appointment to such board has been, a regularly appointed, full-time member or full-time administrative employee of the Police Department and shall continue to be a full-time member or full-time administrative employee of the Police Department during his period of service on such board."

The proposed Charter amendment further provides that neither the Mayor, the Police Commissioner nor any other officer of the City of New York may establish any other form of review board for the review of civilian complaints against policemen.

It is provided in Sections 24 and 37 of the Municipal Home Rule Law that within 30 days after the filing of such a petition, the City Clerk shall transmit his certificate to the City Council stating whether the petition contains a sufficient number of valid signatures and complies with all the requirements of law. Pursuant to the statute, the respondent transmitted such a certificate to the City Council on August 5, 1966. His certificate stated that the petition filed by petitioner contained a sufficient number of valid signatures that is, at least 30,000, as required by Section 37 of the Municipal Home Rule Law, but that the petition failed to comply with the requirements of law in the following respects:

(a) Such proposed local law is not within the intent and meaning of Section 37 of the Municipal Home Rule Law. The proposal is not in fact a real Charter Amendment to the City Charter in that it is unrelated to the basic structure and frame of City government, commonly known as 'Short Form Charter'. The proposal, while couched in the form of a Charter Amendment, is truly an administrative procedural detail. The initiative contemplated by Section 37 of the Municipal Home Rule Law does not provide for direct action by the voters in New York City in the ever-changing administrative details of the municipal government and its agencies and which has been left to the State and municipal legislatures.

(b) The proposed local law pertains to the disciplinary procedures which have been, since 1936, the function of the Administrative Code not simply with reference to the Police Department but all other agencies of City Government. Amendments to the Administrative Code are within the legislative jurisdiction of the City Council and the statutory concurrence of the Mayor of the City of New York.

(c) The proposed local law is an unlawful attempt to amend the Administrative Code which already provides administrative mechanics of the discipline of members of the police force. The amendment of the Administrative Code in such matters is within the legislative province of the City Council or the state legislature."

It is submitted that the respondent's objections to the within referendum petition are without substance. As hereinafter shown, the petition complies with all the requirements of law, and the respondent should be directed to so certify to the City Council.

ARGUMENT

THE REFERENDUM PETITION FILED BY PETITIONER PROPOSES A PROPER AND LAWFUL AMENDMENT TO THE NEW YORK CITY CHARTER PURSUANT TO SECTION 37 OF THE MUNICIPAL HOME RULE LAW AND COMPLIES WITH ALL THE REQUIREMENTS OF LAW.

Section 37, subdivision 1, of the Municipal Home Rule Law provides that:

> "1. A local law amending a city charter (however extensively) or providing a new City charter, also may be adopted in accordance with the provisions of this section."

Section 2, subdivision 2 of the Municipal Home Rule Law defines the term "charter amendment" to include "a new charter or any change in an existing charter presented as such under authority of this chapter" and states further that "a charter amendment may be of any extent and may deal with any numbers of subjects."

The petitioner's referendum petition seeks to add a new section 440 to the New York City Charter. The new section would empower the Police Commissioner to establish in the New York City Police Department a Review Board staffed by police officials to pass upon civilian complaints against members of the police force, but would prohibit the establishment of any other form of review board by any City officer.

The proposed amendment would modify the very Charter powers which the City has recently argued, with success in this Court, authorized the recent creation by the Police Commissioner of a Civilian Complaint Review Board dominated by civilians appointed by the Mayor. Cassese v. Lindsay, NYLJ, June 24, 1966, p. 12.

The proposed local law meets the plain and unambiguous requirements of the Municipal Home Rule Law. It offers a "local law amending a City Charter" in accordance with Section 37. As provided in Section 2 sub. 2 of the Law, it is "a change in an existing charter presented as such under authority of this chapter." The statute expressly provides that a charter amendment "may be of any extent and may deal with any number of subjects". There is no basis in the statute, therefore, for respondent's objection that the proposed amendment purportedly is "unrelated" to the "basic structure" of New York City government or that in the respondent's opinion it belongs in the Administrative Code.

The respondent's objection is apparently based on Maylender v. Morrison, 260 App. Div. 892, 22 NYS 2d 555 (3rd Dept. 1940) aff'd. 284 N.Y. 575 (1940) and Astwood v. Cohen, 291 NY 484 (1944), cases which have long since been overruled by statute.

Maylender v. Morrison, supra, invalidated a proposed referendum petition seeking to establish a new charter for the City of Johnstown pursuant to Section 19-a of the then City Home Rule Law, on the theory that the law permitted only an "amendment" to an existing charter and that a new charter did not constitute such an "amendment".

In Astwood v. Cohen, supra, the Court of Appeals carried further this restrictive definition of the term "amendment" in striking down a proposed local law which would have amended the New York City Charter to provide a salary bonus for policemen and firemen. The Court noted that New York City had a "short form charter, setting forth the structure of the City Government and the manner in which it is to operate" and an Administrative Code supplemental thereto, and ruled that the proposed local law was invalid because it only changed employee salaries fixed by the Administrative Code, leaving untouched the charter powers of the Board of Estimate and the City Council to fix such salaries. In the Court's opinion such a local law was not a charter "amendment" because it was "unrelated to any provision of the New York City Charter", and constituted an impermissible attempt to exercise the Board of Estimate's "administrative" authority to determine salaries. The Court expressly stated that it would not limit permissible amendments by referendum "to those which affect structure only" but said that:

> "The test of validity in every case is whether the local law is in truth and in fact an amendment of a City Charter. Maylender v. Morrison, 260 App. Div., 892, 22 NYS 2d 555, affirmed 284 N.Y. 575, 29 N.E. 2d 395; Steinberg v. Meisser, 291 N.Y. 685, 51 N.E. 2d 945. The tradition of representative democratic government is too strong to permit an inference that the Legislature intended to extend the exceptional process of direct legislation to details of administration unrelated to amendments of the Charter, whether regulated by local laws and ordinances or managed by responsible administrative agencies."

In Astwood v. Cohen, a dissenting opinion by Judge Loughran, joined by Judge Desmond, expressed the view that the word "amendment", used without restriction,"is to be taken to include not only corrections or alterations of an antecedent text but also additions wholly alien thereto." The dissent noted that this was the definition of "amendment" accepted by the Supreme Court of the United States with respect to the scope of permissible amendments to the United States Constitution. National Prohibition Cases (Rhode Island v. Palmer) 253 U.S. 350 (1919). While the respondent, in rejecting the present petition, has apparently relied on the majority opinion in Astwood, it is the minority opinion which has subsequently prevailed and is now the settled law.

A few months after the decision in Astwood v. Cohen, the Legislature amended sections 2 and 19-a of the City Home Rule Law. This amendment added a new section (which has now been carried over to section 2, subdivision 2 of the Municipal Home Rule Law, without substantial change) reading as follows:

> "The term 'charter amendment' means any change in an existing charter presented as such under authority of this chapter or any charter or State statute. A charter amendment may be of any extent and may deal with any number of subjects. A proposal presented as a charter amendment shall not be rejected as such on the ground that it constitutes a new charter." (L. 1944, ch. 602).

The amendment further specified, in language now part of section 37, subdivision 1 of the Municipal Home Rule Law, that a local law adopted by referendum pursuant to that section could amend a city charter "however extensively".

The plain language of these statutory amendments speaks for itself. The Legislative history of the amendments contained in the legislative "Bill jacket" confirms their manifest intent to permit the people full opportunity to express their will in enacting any kind of amendment to a city charter.

Particularly noteworthy is the following letter by Senator Thomas C. Desmond, Chairman of the State Committee on Affairs of Cities, written to Charles D. Breitel, then counsel to the Governor:

> "Dear Mr. Breitel:
>
> There has been passed by both the Senate and Assembly and there has been sent to the Governor the Desmond bill, Senate Introductory 1007, Print 1129, to amend the city home rule law in relation to charter amendments. Copy of the bill is attached.
>
> This bill seeks to carry out the original intent of Section 19-a of the city home rule law, which was first enacted by a law passed in 1937 of which I was a co-sponsor. That intent was to permit any change to be made in a city charter by petition and popular vote, with an opportunity in every case for the city council to consider the change and to satisfy the petitioners with a better alternative if the council can do so.
>
> The bill is approved by the Citizens Union of New York City.
>
> Sincerely yours,
>
> Thomas C. Desmond (signed)"

A second letter to the Governor from Dixon Ryan Fox, President of Union College, was as follows:

"My dear Governor:

At one of our Empire State Town Meetings held here last year, we discussed the proposed means of changing city charters by petitions to the council and, in case of indifference in that quarter, a forced election. I twas much impressed by the remarks of George H. Hallett on that occasion, and subsequently gave the matter a little study.

I hope you will find it possible to concur with the unanimous vote of the Legislature, in recognizing that a charter amendment may be as extensive as desired.

Cordially yours,

Dixon Ryan Fox (signed)"

The Citizens Budget Commission, Inc., transmitted a memorandum in opposition to the proposed amendments of the City Home Rule Law. The Commission stated therein that it opposed the proposed law because its apparent purpose was to overrule *Maylender v. Morrison*, and added that the Commission's opposition was motivated more strongly by its fear that the statutory amendments would overrule *Astwood v. Cohen*. The Commission reviewed the current state of the law restricting permissible charter amendments by referendum and stated:

> "It would surely be most unfortunate if this trend were reversed and the salutory rule of the *Astwood* case abolished by legislation."

Of further interest is a brief memorandum from "R.A.L." (not otherwise identified) to "C.D.B." (probably Charles D. Breitel, then Counsel to the Governor) stating:

> "I guess that the bill is the result of the decision in Maylender v. Morrison, 260 App. Div. 892, aff'd 284 N.Y. 575. The result may very well be to upset the decision in the Astwood case wherein the cops and firemen attempted to 'referend' us to the tune of about $13,000,000 per annum on a war bonus . . . "

The effect of the 1944 amendment of the City Home Rule Law on the principles established in Astwood v. Cohen, was passed upon by the Court of Appeals in Warden v. Police Department of City of Newburgh, 300 N.Y. 39 (1949). The Court in that case approved a proposed charter amendment fixing minimum salaries for policemen in the City of Newburgh, an amendment substantially similar to the one struck down in Astwood. In a unanimous opinion written by Judge Loughran (the author of the dissenting opinion in Astwood) the Court ruled that the rule of the Astwood case had been changed by the subsequent amendments of the City Home Rule Law, defining "amendment" to include "any change in an existing charter presented as such under authority of this chapter" and providing that an amendment "may be of any extent and may deal with any number of subjects." The Court said:

> "There is no escape from words so plainly used. In the light thereof, the present proposed local law cannot be successfully questioned on the score of its being wholly alien to the text of the Charter of the City of Newburgh."

The Court in Warden further stated:

> "The second objection of the taxpayer - that the power to fix salaries is administrative rather than legislative in character and hence is not subject to the power of referendum - can be shortly disposed of. The above amendments to the City Home Rule Law now make such a distinction entirely inadmissible as a reason for invalidating a charter amendment proposed to be made by local law."

In so holding, the Court of Appeals in the Warden case noted that the question "Whether the above 1944 amendments to the City Home Rule Law permit additions to a short-form charter of matters unrelated to existing provisions thereof is a question which is here not presented." None-theless, the rationale of Judge Loughran's opinion in Warden leaves the Astwood principles completely without vitality. The Astwood principle that an addition wholly alien to a charter is not an "amendment" thereof, has no remaining force in light of the Warden court's recognition that the 1944 statutory amendments expressly overruled this theory. The same is true of the holding in Astwood that a charter "amendment" can not concern itself with "administrative" details; the Warden Court expressly held that the amendments of section 19-a made this argument "inadmissible". Thus, while the Warden Court purported to leave open the question of the validity of an "unrelated" amendment to a "short form" charter, it did not leave standing any reasonable basis for challenging such an amendment.

The Municipal Home Rule Law itself leaves no room for any reasonable distinction between charters which are "short form" and those which are not. The Law (section 2, subdivision 2) plainly defines the term "charter" as a "state statute or a local law which establishes or continues a specific county, city or village as a municipal corporation or body politic and includes the fundamental provisions defining, extending or limiting its corporate powers or affecting the framework of its government." The Law provides that any such charter may be amended as provided therein. This clear statutory language, recognizing only one form of charter, affords no basis for argument that a "short form" charter is not subject to amendment to the same extent as any other city charter.

It is evident, therefore, that in going back to the Astwood decision for objections to the present referendum petition, the respondent has relied on a defunct ruling which has been overruled by both the legislature and the courts.

It requires emphasis at this point that even under the principles of the defunct Astwood case, the present referendum petition would be proper and valid. It proposes a charter amendment which would authorize the creation of a police-staffed civilian complaint review board and would circumscribe the power of city officers with respect to the establishment of such a disciplinary tribunal to investigate civilian complaints against policemen. Unlike the police bonus amendment considered in Astwood, the present amendment deals directly with questions of administrative power and is not unrelated to existing provisions of the charter it seeks to amend.

A separate action currently in the courts has challenged the power of the Mayor and Police Commissioner pursuant to the New York City Charter to establish the existing Civilian Complaint Review Board of the New York City Police Department. Cassese v. Lindsay, NYLJ June 24, 1966, p. 12 (1966). The present Board was established by order of the Police Commissioner on May 17, 1966 and is dominated by civilians appointed by the Mayor. In Cassese v. Lindsay, supra, this Court upheld the validity of the present Board as a proper exercise of the Commissioner's powers under the New York City Charter. The Court cited the following provisions of the New York City Charter as upholding the power of the Police Commissioner to establish the present Board:

> "Section 431 of the New York City Charter sets forth that the head of the Police Department shall be a police commissioner appointed by the Mayor. Charter Section 432 vests control of the department in the Commissioner. Subdivision (a) thereof provides that the Commissioner 'shall have cognizance and control of the government, administration, disposition and discipline of the department and of the police force ...' Section 434 (b) additionally sets forth that the Commissioner 'shall be chargeable with and responsible for the execution of all laws and the rules and regulations of the department.'"

In addition to the foregoing charter provisions, the Corporation Counsel in Cassese v. Lindsay, supra, relied upon the powers of the Mayor as supporting the validity of the existing Board. The Charter Provisions cited in this connection included section 3 (naming the Mayor as "chief executive officer" of the City); Section 7 (authorizing one of the deputy mayors "to supervise the other offices and departments of the City"); and section 8 (delegating to the Mayor "all the power vested in the City except as otherwise provided by law").

The plaintiffs in Cassese v. Lindsay, supra, argued that the Police Commissioner, by delegating disciplinary powers to a board of civilians, violated Section 434a-14.0 of the Administrative Code. That section provides that the Police Commissioner may punish a policeman for various offenses and specifies that charges against a policeman shall be examined, heard and investigated by the commissioner or one of the deputy commissioners. This Court expressly held in Cassese v. Linday, supra, now on appeal, that this section of the Administrative Code relates only to hearings on formal charges preferred by the Commissioner and does not limit the commissioner's authority, pursuant to his powers granted by the charter, to establish a civilian board to deal with civilian complaints.

If the holding of the Court in Cassese v. Lindsay is upheld, it will be clear that the power of the Police Commissioner to establish a Civilian Complaint Review Board composed of civilians depends exclusively on the Charter. If that view prevails, then obviously it is the Charter, not the Code, which controls the power to establish such a Board and which must be amended in order to limit such power of the Commissioner. Whatever the result in that case, however, the arguments therein have amply demonstrated that the present proposed amendment to the Charter is not "unrelated" to the existing provisions of the Charter which contains many provisions dealing with the control and discipline of the Police Department.

It should be noted, furthermore, that the New York City Charter presently contains a number of provisions establishing administrative boards of various kinds. Examples are section 84 (establishing a community planning board for each community district, consisting of the councilmen from that district and five to nine additional members appointed by the borough president, to advise the borough president, the city planning commission and the borough improvement board); Section 227 (site selection board); Section 582-a (board of hospitals, composed of the commissioner, five doctors and five laymen appointed by the Mayor); Section 584 (advisory council to give advice to the commissioner of hospitals; Section 626 (creating a city board of correction with nine members appointed by the Mayor, to investigate correctional institutions and report their findings and recommendations to the commissioner of correction and the Mayor; Section 851 (art commission; detailed provisions governing its operations are contained in Sections 851-855); Sections 905 and 910 (detailed provisions with respect to the community mental health board); Section 910-C (providing that the Mayor "may" appoint an advisory committee to advise the community mental health board; and 1084 (real estate advisory commission).

The present amendment would merely authorize the establishment of one more governmental board, among so many already established or authorized by the Charter, to give advice and assistance to the head of a city department. The subject matter of the amendment is no more a matter of "procedural administrative detail", as the respondent asserts, than the many other provisions of the Charter to which reference has been made.

Even if this case were being decided, therefore, under the old rule of Astwood v. Cohen, the present petition clearly proposes a proper charter amendment. Unlike the local law proposed in Astwood, the present amendment bears a definite relation to and is intended to affect powers expressly contained in the Charter. As such it is a valid amendment pursuant to Section 37 of the Municipal Home Rule Law under any view of the law.

CONCLUSION

This proceeding raises only one question - and that is the question whether the people of the City of New York have the right to express their will on the issue raised by the within petition. The merits of the petition will be decided by the democratic process of free election and are not involved herein.

Section 37 of the Municipal Home Rule Law was expressly intended to give expression to the popular will. Its provisions have been repeatedly broadened to defeat just such arguments as have been advanced by the respondent herein in an effort to frustrate the popular will. It is submitted that the plain terms of the law make such arguments inadmissible. On this vital public issue, the people are plainly entitled to be heard. Petitioner respectfully prays the Court to enter an order and judgment enforcing that right.

The petition is clearly valid and should be so declared. The respondent should be directed to so certify to the City Council.

Respectfully submitted,

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
Attorneys for Petitioner

Charles Ballon
Eugene M. Kline
Michael J. Silverberg
-Of Counsel-

PBA

July 20, 1966

Murray Gordon, Esq.
401 Broadway
New York, New York

Dear Mr. Gordon:

Enclosed is a draft of a memorandum of law addressed to the City Clerk concerning our considered opinion that the proposed charter amendment limiting the right of the Commissioner of Police and the Mayor to members of the Police Force is in violation of law.

The point involved is unusual and it was thought advisable that we express our opinioh immediately in the hopes that the Clerk would be persuaded thereby that the PBA proposal is illegal. Should the Clerk refuse to certify the petition and the PBA seek Court relief then the Corporation Counsel would be required to defend the position of the Clerk. This is important.

We request two things:

(1) You give us your editorial corrections to improve this draft (we hope to do this also).

(2) That you participate with us in this endeavor and make it a joint endeavor.

Sincerely,

Carl Rachlin
General Counsel

CR/vh

PBA

July 20, 1966

Maria Marcus, Esq.
Legal Department
N.A.A.C.P.
20 West 40th Street
New York, New York

Dear Miss Marcus:

Enclosed is a draft of a memorandum of law addressed to the City Clerk concerning our considered opinion that the proposed charter amendment limiting the right of the Commissioner of Police and the Mayor to members of the Police Force is in violation of law.

The point involved is unusual and it was thought advisable that we express our opinion immediately in the hopes that the Clerk would be persuaded thereby that the PBA proposal is illegal. Should the Clerk refuse to certify the petition and the PBA seek Court relief then the Corporation Counsel would be required to defend the position of the Clerk. This is important.

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(2) That you participate with us in this endeavor and make this a joint endeavor.

Sincerely,

CR:tp
Encl.

Carl Rachlin
General Counsel

PBA

July 20, 1966

Sol Rabkin, Esq.
General Counsel
Anti-Defamation League
315 Lexington Avenue
New York, New York

Dear Mr. Rabkin:

Enclosed is a draft of a memorandum of law addressed to the City Clerk concerning our considered opinion that the proposed charter amendment limiting the right of the Commissioner of Police and the Mayor to members of the Police Force is in violation of law.

The point involved is unusual and it was thought advisable that we express our opinion immediately in the hopes that the Clerk would be persuaded thereby that the PBA proposal is illegal. Should the Clerk refuse to certify the petition and the PBA seek Court relief then the Corporation Counsel would be required to defend the position of t the Clerk. This is important.

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Sincerely,y

Carl Rachlin
General Counsel

CR:vh
Encl.

PBA

July 20, 1966

Mr. Aryeh Neier
Director,
New York Civil Liberties Union
156 Fifth Avenue
New York, New York

Dear Mr. Neier:

Enclosed is a draft of a memorandum of law addressed to the City Clerk concerning our considered opinion that the proposed charter amendment limiting the right of the Commissioner of Police and the Mayor to members of the Police Force is in violation of law.

The point involved is unusual and it was thought advisable that we express our opinion immediately in the hopes that the Clerk would be persuaded thereby that the PBA proposal is illegal. Should the Clerk refuse to certify the petition and the PBA seek Court relief then the Corporation Counsel would be required to defend the position of the Clerk. This is important.

We request two things:

(1) You give us your editorial corrections to improve this draft (we hope to do this also).

(2) That you participate with us in this endeavor and make this a joint endeavor.

Sincerely,

CR:tp
Encl.

Carl Rachlin
General Counsel

PBA

July 20, 1966

Marvin Karpatkin, Esq.
Karpatkin, Ohrenstein, Karpatkin, Esqs.
660 Madison Avenue
New York, New York

Dear Mr. Karpatkin:

Enclosed is a draft of a memorandum of law addressed to the City Clerk concerning our considered opinion that the proposed charter amendment limiting the right of the Commissioner of Police and the Mayor to members of the Police Force is in violation of law.

The point involved is unusual and it was thought advisable that we express our opinion immediately in the hopes that the Clerk would be persuaded thereby that the PBA proposal is illegal. Should the Clerk refuse to certify the petition and the PBA seek Court relief then the Corporation Counsel would be required to defend the position of the Clerk. This is important.

We request two things:

(1) You give us your editorial corrections to improve this draft (we hope to do this also).

(2) That you participate with us in this endeavor and make this a joint endeavor.

Sincerely,

CR:tp
Encl.

Carl Rachlin
General Counsel

JUL 25 1966

July 23, 1966

Dear Mr. Rachlin:

The enclosed matter will be of some interest to the appropriate person in C.O.R.E., who shall, however, refer it to someone of your office for consideration, so I thought it best to route it to you in the first instance.

The subject concerns the PBA-Conservative Party Charter initiative re. Police Review Boards. In the annexed letter to the Mayor I show that the language of the bill goes far beyond its purported limitation, alleged to be solely to determining the composition of the members of that board, ie. shall its members be persons employed in the Police Department, or shall its members be "independent citizens"?

The bill actually is a bold attempt by police to substantially invest the local Police Department as an autonomous agency within the City, exempted from any surveillance as to the functions of its personnel by the Mayor and the City Council and every other City agency. It is a covert attempt to repeal the general provision of the Administrative Code unde which the Commission on Human Rights, for example, is empowered to receive complaints, and conduct hearings on discriminatory acts by City employees, to the extent such acts of discrimination are done by police department personnel. (See Sec. B1-5.0, Administrative Code.)

Surely counter-revolution does not tread warily. That, in the assault against citizen police review boards, they have the arrogance to now seek complete exemption from inquiry by the highest officers of the municipalities, is a shocking phenomena.

Sincerely yours,

John M Lawrence

JOHN M. LAWRENCE
57 West 10 St.
New York, N. Y.

Cassese PBA case
v
Katz

July 23, 1966

Hon. John Lindsay
Mayor of the City of New York
City Hall
New York 7, N. Y.

Re: Charter Initiative by the P.B.A.
and the Conservative Party to
Outlaw Independent Investigation
of Complaints against Police Employees

Dear Mr. Mayor:

I have just had the opportunity of reviewing the text of the P.B.A.-Conservative Party City Charter amendment initiative proposal. This review indicates that the proposal is void on its face, as well as a most unwise measure. Whether its legal defects are due to intentional excess, or to carelessness in drafting, I cannot say.

The proposal, by its exact language, says as follows:

> "Neither the Mayor, (or any official acting in his behalf,) the (Police) Commissioner, nor any other . . . officer of the City of New York shall have the power to authorize any person. . . or group to receive, (or) investigate, (or) hear, (or) require (action) or recommend action upon civillian complaintss, (i.e. allegationss of misfeasance or malfeasance of any sort made by any person who is not a full-time employee of the Police Department against anyone who is a full-time employee of the Police Department) except (if such person so authorized by any such officer of the City of New York is) "one of the deputies, or the assistant to the (Police) Commissioner," (or is a member of a board having solely recommendatory powers to which he has been appointed by the Police Commissioner upon showing such board member has for at least one year been a full-time administrative employee or police officer in the New York City Police Department.)"

Additionally, the proposal provides that no person shall be "disciplined or otherwise penalized" for "his failure to appear before, or respond to the inquiries" of any person deprived of the powers mentioned in the paragraph above. That is, the proposal purports to outlaw the use of summonses or subpoenas by any City officer purporting to investigate a complaint against a full-time Police Department employee, except as such solely is issued by the above mentioned board members, or deputy or assistant of the Police Commissioner.

What is eminently clear is that the P.B.A.-Conservative Party proposal is aimed at outlawing every sort or investigation or quasi-judicial hearing by any City authority, regardless of what the purposes of such inquiry may be, if the initiatory, or any subsequent derogatory allegation upon which such inquiry proceeds is made by a person who is not a full time Police Department employee, alleges mis- or malfeasance by a full-time (or part-time) Police Department employee, and where such inquiry is not conducted by a plus-one-year full-time employee of the Police Department.

The proposal seeks to outlaw:

1. Investigations by the Commissioner of Investigation in actions of Police Department personnel, where the initiatory information comes from other than a Police Department source;
2. Investigations by the City Commission on Human Rights, (pursuant to Admin. Code Sec. B1-5.0(4), where, again the initiary matter comes from other than Police Department sources.
3. Investigations by a City Council Committtee, or any staff of the City Council, concerning Police Department personnel activities;
4. Etc.

The thrust of this proposal is to exempt conduct of Police Department personanel from scrutiny by any City authority not staffed by Police Department personnel. (The proviso in the proposal that the initiative amendment shall not be construed to impair the functions of courts, the district attorneys and grand juries, is merely frivolous, as in no plausible way could it be deemed the City Charter might impair the State functions performed by the State officials named.)

I do not think there is any doubt that the proposal, insofar as it reads to strip the City Council of its powers by a committe chairman, (See Secs. 6, 7 an 8, General City Law) to subpoena all persons in the course of investigating any matter within its jurisdiction, or in any matter concerning any city employees, is void. On this basis, it seems to me, the initiative should be stricken from the ballot.

But, more, I believe that the drastic, impolitic nature of this proposal should be elucidated for the benefit of the public. The idea that checks and balances upon Police Department personnel activities, by a watchful Mayor and City Council, ought be prohibited is fantastic. The P.B.A.-Conservative Party proposal seeks to convert the Police Department operations in a self-ruling empire.

Imagine, if you will, the storm that would arise in this nation if the Generals and Admirals of the Army and Navy dared claim they must bar the President and Congress from inquiring into conduct of Army and Navy personnel! That Congress or the President could not "receive" or "investigate" or "hear" any civilian complaints against any military personnel, unless the persons authorized to receive, investigate or hear the complaints were full time Army or Navy personnel! Let us remember that it is police who are constantly bruiting about the notion that their functions are similar to those of the military. When these police people now propose to make themselves an autonomous paramilitary agency, exempt from the scrutiny of the high legislative and executive officers of our municipality, we may fairly wonder as to the democratic-ness of the political ideology these police people hold to.

At the last sentence of paragraph one, above, I raised the question of whether the excesses in the P.B.A.-Conservative Pary proposal is due to carelessness in the drafting of the bill, or whether the language of the bill is as it is because it was intentionally contrived that way. The history of struggle to establish an independent citizen review of charges of police misconduct tends to indicate that the matters objected to in the bill are those of intentional excesses, and not mere matters of faulty drafting. I call your attention to the following:

At paragraph (c) of Sec. 1 of the proposal, the bill specifies that the:

> "board may have the power to receive, to investigate, to hear AND (emphasis supplied) to recommend action upon civilian complaints of the Police Department. . . "

However, compare this with the language later specified in the bill, (a) at paragraph (c) of Sec. 1, to wit:

> "Neither the Mayor, the Commissioner nor any other administrator or officer of the City of New York shall have power to authorize any person, agency, board or group to receive, to investigate, to hear, OR (emphasis supplied) to require or to recommend action upon, civilian complaints. . . "

and at paragraph (d) of Sec. 1, to wit:

> "to receive, to investigate, to hear, OR (emphais supplied) to require or recommend action upon civilian complaints. . . "

The variant usages, using the conjunctive term "and" in the one instance, and the disjunctive term "or" in the latter two instances, manifests the prohbitory matters stated in the proposal are intended to go far beyond the limited issue of membership composition of the mere recommendatory disciplinary pre-review board.)*) It seems unlikely that the variant use of the conjunctive, in the ifrst instance, and the disjunctive later, was due to mere oversight. The P.B.A.'s historic animus to you, the Mayor, and to City Councilmen, concerning themselves with charges against policement, tneds to indicate a deliberate

---

(*) The language of this bill indicates that the Police Commissioner is, further, stripped of power to suspend a police officer until after (1) he has had a recommendatory board hearing, and (2) after he has had a final hearing, on written charges, before the Commissioner personally or his deputy or assistant (Par. ([illegible]) of Sec. L), and that the Commissioner in the final hearing is disallowed using any means to compel a police employee charged from attending the final hearing, (Par. (d) of Sec. 1) attempt by the intiative's supporters to deprive you, as Mayor, and to deprive the City Councilmen, of power to concern yourself with Police Department deportment.

The question that repeatedly comes to my mind is: "why is it that policement who insist they should have the right, as the "stop and frisk" provision alleges, to investigate any person on mere suspicion, now seek to deprive even the duly constituted high officials in the City government from checking up on them"? "Why is it they allege that only those who are members of the "club" of policemen are competent to judge their actions"?

Paralell to this comes another question. "If it is true, as the bill itself seems to argue, that only policemen are capable of "receiving complaints, investigating complaints, and hearing complaints" against policemen -- so that the humble citizen is deemed illiterate on the subject of judging the acts of policemen -- how then is the citizen capable of judging that even policemen are capable of judging policemen?" If we as citizens are so incompetent in matters where police conduct is concerned, how can it be deemed we can judge the policemen are capable of judging themselves?

I do hope that you will take affirmative legal action to inhibit this measure from being placed before the voters, at least on its repugnance to Secs. 6, 7 an 8 of the General City Law. Further, I hope you will demonstrate to the people that this is a badly conceived proposal, which attempts to remove the historic checks and balances our republican form of government has always sought to keep upon any branch of government bureaucracy, by the provisions imposing duty upon the chief executive and the legislative body to, from time to time, investigate the efficiency and rectitude of personnel in the government departments. Certainly, in a day when graft and corruption is widespread in the police department, it would be unconscionable neglect for you to allow the hand of your Commissioner of Investigation to be stayed in such areas. In a day when racism is a common practice by some policemen, it would be unconscionable neglect for you to allow the hard-won rights of the Commission on Human Right to essay complaints of misconduct in this area by police to be forbidden.

Sincerely yours,

JOHN M. LAWRENCE
57 West 10 St.
New York 11, N. Y.

cc. Carl Rachlin, C.O.R.E., 38 Park Row, New York, N. Y.
Basil Patterson, 315 West 125 St., N. Y., N. Y.

July 24, 1966

To: Scholarship, Education and Defense Fund for Racial Equality
c/o Congress of Racial Equality

Re: Memorandum, alleging invalidity proposed Local Law, by Initiative,
Amending City Charter, re. procedures for hearing of complaints
against members of the Police Department by "civilians".

The above titled defense fund, in a memorandum, dated ______________, claims that the City Charter amendment, proposed by initiative, (by the P.B.A. and the Conservative Party,) is a void proposition because it is not a genuine Charter Amendment proposal, but is only in the nature of mere change in local ordinances, or administrative code type of law. The author's theory, in such memorandum, is that the City Charter is intended to be in the nature of a "constitution", solely allowed to contain general grants of powers, and cannot be used to define specific procedures that the head of a City Department may follow. The claim of the memorandum writer is that Charter initiative is merely limited to prescribing the class of persons who may staff a board empowered to hear "civilian complaints against members of the police department," and that the initiative does not wide-rangingly affect grants of powers to officers or bodies of the City government.

. . . .

I. The Charter Amendment Initiative proposes radical changes in the delegated powers of City Officers, and is not limited to a mere specification of the class of persons who may sit on a civilian review board.

Sec. 1 (c) of the PBA-CP Charter Amendment initiative provides that "the Mayor, (or any official acting on his behalf,), the (Police) Commissioner, (or) any other . . . officer of the City of New York shalll (not) have power authorize any person. . . or group to receive, (or) to investigate, (or) to hear, or to require or to recommend action upon civilian complaints, (i.e. allegations of faulty conduct made by a person who is not a 'full time employee of the police department') against members of the police department, except as (such person or group authorized to so receive, investigate, hear, or require or recommend action on such claims of fault shall be "on of (the) deputies or the assistant to the (Police)Commissioner, or shall be person or persons appointed by the Police Commissioner to a recommendatory action board, provided such person or persons shall have been for one year prior to such appointment a full-time administrative or police officer employee of the City Police Department, or shall be a court, member of a grand jury, a district attorney or any other (criminal law enforcement agency employee). "

Additionally, the Initiative provides that, (Sec. 1 (d), Charter initiative), the City officers who are deprived of power, as mentioned in the preceeding paragraph, to receive or investigate or hear or require or recommend action upon civilian complaints against members of the police department, cannot make use of any "process", i.e., summonses or subpoenas, or their enforcement by contempt proceedings, fine or otherwise, to compel any person, including any employee of the police department to attend any proceeding where the City officer mentioned might attempt to elicit matters relating to such kinds of civilian complaints.

The initiative is a baling-hook law. It swings broadly so as to deprive (1) The Mayor, (2) The City Councilmen, and (3) every other sort of administrative or legislative officer of the City of New York of right, authority or power to

(1) so much as "receive" a complaint (that is, an

allegation of faulty conduct or performance) by a civilian, (i.e. a person who is not a full time employee of the police department) against a person who is employed in the Police Department; OR (the disjunctive)

(2) "investigate" respecting such a complaint, OR

(3) "hear" matter mentioned in such complaint, OR

(4) "require" any sort of "action" in remedy of such allegation of faulty performance, OR

(5) "recommend" to any person any "action" in remedy or disposal of such "complaint".

The thrust of this initiative is bar the City's chief executive, chief or plenary legislative, and every other kind of "officer" of the City of New York, or any agency or department established by it from doing any sort of thing above noted. It repeal the power of the legislators of the City to inquire into matters concerning the affairs of personnel in the police department, where there is a "civilian complaint' promoting the interest in the subject matter. It prohibits the Mayor, in any manner asking any person who is not a police department employee from inquiring into any matters of faulty performance by members of the police department. By the initiative, the Commissioner of Investigation will be barred from pursuing any inquiries relating to Police Department personnel; the Commission on Human Rights will be deprived of the power stated at Sec. B1-5.0 of the Administrative Code to process complaints, or conduct inquiries into discriminatory actions by members of the police department. Even the City Controller shall be precluded from inquiring into complaints made by non-police department employees of matters of waste and mismanagement by police department personnel.

The initiative is not a mere minor local ordinance type of law. It is a free swinging attack on the charter powers of City offices generally. This Charter initiative is a bold attempt by policemen to assert for the Police Department a genuine autonomy. It is a kind of act of secession, by which the policemen seek to destroy right in the chief executive and legislative officers of the City to maintain surveillance over police department operations. The aim of this bill is to convert the Police Depratment into a self-ruling empire, responsible to no elective authority, except in the case of direct criminal prosecutions The Mayor, who appoints a Police Commissioner, is precluded from even assaying the stewardship in office of his appointee by independent inquiry. The City Council is precluded from inquiry into Police Department affairs, insofar as it receives any derogatory matter from non-employees of the Police Department, upon the proviso that if "actions" it requires are founded upon such "civilian complaints", then the remedy provided, i.e.,qthe law passed, will be void.

II. The language of the initiative must be given its common, ordinary, every-day meaning, without reference to extrinsic materials

The Charter Amendment is sought to be enacted by popular vote. When the intent of the enactment is sought, one must find that intent in the language employed, and take into account the nature of enactors who employ it. Because the public will enact this measure, the common, ordinary, eve ry-day meaning of the terms employed must be used.

The term "complaint" ordinarily means nothing more than a fault finding allegation. In the initiative, by the special mention that criminal prosecutions are not comprehended in the term "complaint" it is clear the term "complaint" so employed is not synonymous with an official or formal charging of "wrongdoing". As used in the initiative, the term "complaint" is broad enough, for example, to include a case of a citizen telephoning a City officer complaining that policemen assigned to a post of duty is not patrolling the area he is assigned to work, or that a policeman has been discourteous, etc.

The term "officer", as used in the initiative is a broad term, encompassing any person who fills an "office" under the municipal corporation. The broadness intended is shown by the frivolous reference in Sec. 1 (e), where the framers of the initiative went so far as to state that State officers, like judges, grand jurors and district attorneys were not meant to be included in the borad term "officers of the City of New York".

The term "action", again, is left totally unqualified, and as read in conjunction with the term "require. . . action" tends to show that this Charter Amendment is intended to preclude City Council from passing a law which provides remedy against conduct by police complained of.

The terms "investigate" and "hear", again, are left unqualified, and broad so as to comprehend all sorts of inquiries and sessions for the consideration of testimony, whether they be legislative, quasi-judicial or even ministerial.

This is a very broadly phrased proposal, in the nature of radical amendment of the Charter, and is no mere trivial ordinance type of law. The drafters of this initiative deliberately employed the disjunctive term "or" in enumerating the specific powers of which all City officers, (except the Police Commissioner under special conditions,) were deprived. By this they particularized the severability of the powers enumerated, so as to clearly obstruct the City officers from using even one of the powers enumerated.

. . . .

Since this Charter initiative is such a wide swinging repealer of the general legislative and executive-oversight powers of the City Council and Mayor, respectively, and since it goes on further to impair the vested authority of the Commissioner of Investigation and the Commission on Human Rights, it is possible that the face of the proposal is defective because it does not specify in its operative parts the Charter powers it repeals. See. STEINBERG V. MEISER, 181 MISC 433, affd 266 AD 973, affd 291 NY 685; ASTWOOD V. COHEN, 291 NY 484, reh den 292 NY 621.

. . . .

Insofar as the Charter initiative claims to deprive the City Councilmen of power to authorize inquiries into affairs of Police Department personnel, upon complaints by persons who are not employees in the Department, and to bar enforcement of process to compel persons to attend on inquiries or hearings thereon, it is probably repugnant to Secs. 6, 7 an 8, General City Law, and Sec. 10(1)(i), Municipal Home Rule Law, as attempted repealer of the provision of general law on the same subject matter.

. . . .

Apart from legal considerations, this attempt by police department people to convert the department into an autonomous government entity, free of the surveillance of the highest legislative and executive authorities in the municipality, deserves condemnation as oppressively anti-demonratic Not since the day that ecclesiastical authorities in England, demanding the right to run courts deciding public questions, insisted upon the right to be free of review of their actions by the supreme civil authority, have we witnessed as an attempt such as this, wherein a component unit of the governmental system demand it be not subject to surveillance by the supreme civil authority. This bill is an endeavor by the police people to invest in themselves the right to be an empire unto themselves in our midst, albeit succored by the City treasury. The City is to pay the piper, but its duly elected representatibes are to be barred from finding out what tune the piper plays. This bill is a prime example of bureaucratic arrogance. It sets a pattern under which the very unity of government, and thereby the unity of the people themselves, may be destroyed. If policemen are to be accountable only to their own, then why not equally accord to all other City employees the right to surveillance only by their own depratmental co-employees. This is an extremist attack on the concept of orderly government, by a system of checks and balances.

Dated: July 24, 1966

By: John M. Lawrence
57 W. 10 St.
New York 11, N. Y .

new file 1966 Police Ben assoc

same as June public [illegible]

COPY

July 28, 1966

Hon. John V. Lindsay
Mayor, City of New Yogk
New York 7, N. Y.

Re: P.B.A.-Conservative Party Proposed Charter Amendment to Bar Indiependent Official Inquiries of Complaints Re. Police Department Personnel

Dear Mr. Mayor:

Subsequent to my previous letter, dated July 23, 1966, in which I specified to you my analysis and conclusion that the P.B.A.'s Charter amending initiative is a proposal of drastic nature, seeking to draw an Iron Curtain about the affairs of police department personnel, from scrutiny by various interested City agencies and officers, I have further essayed the subject with reference to existing grants of power as specified in the City Charter. From this study it becomes even more certain that the intent of the P.B.A. initiative is exactly to bar outside-of-the-Department City surveillance of police affairs.

Most striking in this regard is the explicit mention in Sec. 1(e) of the proposed Charter Amendment, which proceeds to itemize the exemptions from repealer implications therein. (In my July 23rd letter I erroneously concluded that the first clause of Sec. 1(e) was "frivolous" in representing a charter provision would derogate against any functions of a State officer. Actually, Sec. 1109, City Charter, uniquely does authorize in the Supreme Court functioning in the City, special, strictly local inquisitional powers respecting "alleged violation or neglect of duty in relation to the property, government or affairs of the City. . .") What the City Charter grants amendment to such charter may take away. The Sec. 1(e) initiative proposal provides that "this section shall not be construed to prevent investigations. . . for violations of law by a duly constituted court having jurisdiction", which, in the premises of Sec. 1109, City Charter, and the utter absence elsewhere of any power to conduct "investigations or prosecutions. . . (by) a duly constituted court, tends quite strongly to evidence that the drafters of the P.B.A. initiative fully intended the general repealers previously noted to you. The express mention of the exception or exemption just noted, of special court inquisitional power, reinforces this.

Let it be noted, further, that the P.B.A. initiative is even intende to change Sec. 1109, Charter, by repealing the present provision that such court inquisitions may comprehend cases of mere "neglect of duty" not amounting to "violation of law" For, be it remembered that every neglect does not amount to legal wrong.

I believe it is most urgent that steps be taken to educate the public concerning the drastic nature of the P.B.A. proposal. My own review indicates that the initiative proposes to repeal the present duly vested City officer inquiry powers respecting acts by police department personnel:

1. Mayor: to, "as he may deem necessary to fulfill his duties". . . "(to) create. . . bureaus, divisions or positions within his executive offices. . . (e.g.) whenever in his judgment the public interest shall (require (he) remove from office any public officer holding office by appointment from (him). . ." Secs. 3 and 6(b), Charter.

2. City Council: "to appoint a special committee to investigate any matters relating to the property, affairs or government of the city. . . (and) power to require the attendance and examine and take the testimony under oath of such

persons ~~and examine and take the testimony~~ as it may deem necessary." Sec. 43, Charter.

3. Board of Estimate: "Hold hearings on any matter of City policy or other matters within the scope of its responsibilities(*) . . ." (* e.g. budget matters re. waste, etc.) Sec. 67(4), Charter.

4. Borough Presidents: "Have power to hold public hearings on matters of public interest." Sec. 82(6), Charter.

5. Controller: "powdr to investigate all matters relating to or affecting the finances ~~m~~of the city. . . (and) power to require the attendance and examine and take the testimony under oath of such persons as he may deem necessary". Sec. 93(b), Charter.

6. Budget Bureau Director: "to survey each agency for the purpose of ascertaining its budgetary requirements. . . (and) require . . . any officer or employee to furnish . . . information or answer inquiries pertinent to such survey." Sec. 111(b), Charter.

7. Investigation Commissioner: "make any investigation directed by the mayor or the council. . . (or) which in his opinion is in the best interests of the city, including but not limited to investigation of the affairs, functions, accounts, methods, personnel or efficiency of any agency" and "receive complaints from the public" and "have full power to compel the attendance of witnesses, to administer oaths and examine such persons as he may deem necessary. . ." Secs. 803(1), 803(2), 804 and 805(a), Charter.

The foregoing is not exhaustive, nor does it comprehend review of the Administrative Code to ascertain if other agencies are so impaired, as, for example, the Commission on Human Rights, Sec. Bl-5.0(4), Admin. Code.

The express mention of exemption respecting the Court inquisition powers, in Sec. 1109, Charter, in the P.B.A. initiative, would seem to mandate that in construction of the initiative, if adopted, that the doctrine of "expressio unius est axclusio alterius" applies. Likewise prior usage in Sec. 804, Charter, of the term "complaints from the public" obligates a common, broad construction of the term "civilian complaints" as used in the P.BA. initiative, under the doctrine of "statutees in pari materia".

I will much appreciate noting affirmative, prompt action by you to reduce the danger that the P.B.A. initiative may be enacted. The long evolved checks and balances, won to preserve the interests of fiscal economy , job efficiency, rest raints upon bureaucratic excesses, and to check the Napoleonic tendencies of police commisioners in the past, as well as to root out continuing malpractices by police rank and file, should be zealously defended. The public's right to know how every agency of government operates, through orderly channels of interested inquiry, is best upheld, particularly in the sensitive policing area, under the present Charter provisions.

Sincerely yours,

JOHN M. LAWRENCE
57 W. 10 St.
New Y rk 11, N.Y.

cc.: Cmsnr. Investigation; Controller, Council President; Ted Poston
Sidney Zion.

July 29, 1966

Mr. Abraham Raskin
Editorial Board
New York Times
229 West 43 Street
New York, New York

Dear Abe:

Enclosed is the memorandum of law which I discussed with you earlier this morning. The memorandum was prepared by Carl Rachlin, SEDF's legal director. It has been endorsed already by CORE, the NAACP, American Jewish Committee, and the American Jewish Congress. It will be submitted to the City Clerk's office at about the time you receive it.

If you have any questions about it, call Carl Rachlin at BE 3-4127.

Cordially,

Marvin Rich
Executive Director

MR:hm
Enclosure

1966
PBA
petitions

July 29, 1966

Bernard Richland
O'Dwyer & Bernstein
50 Broad Street
New York, New York

Dear Mr. Richland:

Enclosed is a memorandum filed with the Clerk of the City of New York today advising him of the illegality of the petitions filed with him by the Patrolmen's Benevolent Association and the Conservative Party which purported to propose an amendment to the New York City Charter. If this memo does not produce the results anticipated, ie. lead the Clerk to certify that the petitions do not comply with the requirements of law, we expect to institute court action next week.

We are greatly indebted to you for your advice and aid to Leslie Shapiro and Jim Walrath while they were working on this matter; it was invaluable.

Please feel free to offer any comments or further advice advice you might have.

Thank you again,

Carl Rachlin

General Counsel

Enclosure

July 29, 1966

Mr. John Storm
National Desk
The New York Times
229 West 43 Street
New York, New York

Dear Mr. Storm:

Enclosed is the memorandum of law which I discussed with you earlier this morning. The memorandum was prepared by Carl Rachlin, SEDF's legal director. It has been endorsed already by CORE, the NAACP, American Jewish Committee, and the American Jewish Congress. It will be submitted to the City Clerk's office at about the time you receive it.

If you have any questions about it, call Carl Rachlin at BE 3-4127.

Sincerely,

Marvin Rich
Executive Director

MR:hm
Enclosure

MEMORANDUM

TO: S. Nagler, L. Shapiro, J. Walruth

FROM: Carl Rachlin

DATE: August 1st, 1966

We have received quite a bit of praise for the memo on the P.B.A. There is still, however, a good deal to be done to make it even more first-rate. Our analysis and handling of the Warden case leaves a good deal to be decided not only in the distinction that it bears to the Astwood case but with regard to the gratuitous or semi gratuitous comment made at the end of the case concerning administrative and legislative action. I think we must analyze sharply whether that statement is or is not dicta. Furthermore, I think we ought to have in parallel columns on a sheet of paper for our benefit the statute that existed prior to 1944, the 1944 statute and the 1964 statute. We have to be very precise in our analysis of the changes, if any, that have been made and what effect they have on the Astwood. Furthermore, while statute may vary from state to state, it would be interesting to see whether cases in other states have accepted or rejected the idea that referenda are for the purpose of legislating rather than making administrative decisions. While this would not have formidable legal reference, it could be useful if the argument became close.

Please send copies of the memorandum submitted to the Clerk to every organization participating, keeping a few extras for anyone who wants to join in later.

CR/tp

OFFICE OF THE CITY CLERK
MUNICIPAL BUILDING
NEW YORK, N.Y. 10007

August 5, 1966

The Council
City Hall
New York, N. Y. 10007

Honorable Sirs:

In my communication dated July 7, 1966, I reported that there was filed with the City Clerk a petition which seeks a Charter Amendment of the New York City Charter by adding a new Section 440 relating to the establishment of a procedure for handling civilian complaints against members of the Police Department and requiring such complaints to be heard solely by full-time administrative employees of the Police Department and I transmitted to you a copy of the proposed local law.

I examined such petition filed by AMELIA CASSESE for the purpose of certifying pursuant to Section 37 of the Municipal Home Rule Law:

(1) whether it complies or does not comply with all requirements of law; and
(2) whether it contains a minimum of 30,000 valid signatures.

I CERTIFY that:

I. The petition does not comply with the requirements of law in the following respects:

(a) Such proposed local law is not within the intent and meaning of Section 37 of the Municipal Home Rule Law. The proposal is not in fact a real Charter Amendment to the City Charter in that it is unrelated to the basic structure and frame of City government, commonly known as "Short Form Charter". The proposal, while couched in the form of a Charter Amendment, is truly an administrative procedural detail. The initiative contemplated by Section 37 of the Municipal Home Rule Law does not provide for direct action by the voters in New York City in the ever-changing administrative details of the municipal government and its agencies and which has been left to the State and municipal legislatures.

(b) The proposed local law pertains to the disciplinary procedures which have been, since 1936, the function of the Administrative Code not simply with reference to the Police Department but all other agencies of City Government. Amendments to the Administrative Code are within the legislative jurisdiction of the City Council and the statutory concurrence of the Mayor of The City of New York.

(c) The proposed local law is an unlawful attempt to amend the Administrative Code which already provides administrative mechanics of the discipline of members of the police force. The amendment of the Administrative Code in such matters is within the legislative province of the City Council or the state legislature.

II. There are sufficient number of valid signatures.

The petition purports to contain 51,852 signatures. An actual tally shows 51,716 of which 16,293 are invalid and, at most, 35,423 are valid signatures of qualified voters.

C.

The petitioner is commended for the manner of her submission of convenient bound volumes, well documented pages isolating each county and, in most instances, each assembly district, all of which rendered the tallying of valid or invalid signatures a facile task.

By reason of the premises set forth in paragraph (a), I CERTIFY that the petition is insufficient in law.

Respectfully yours,

HERMAN KATZ, CITY CLERK

August 10, 1966

Mr. Abraham Raskin
Editorial Board
New York Times
229 West 43 Street
New York, New York

Dear Abe:

I know you do not handle the News desk, but I do want to express my dismay on the TIMES' coverage of the PBA suit. As you know, SEDF lawyers prepared the memorandum of law challenging the validity of an initiative. The regulations we submitted to the City Clerk, Herman Katz, were those used in invalidating the initiative.

Later, when the PBA appealed his decision, we prepared an amicus brief supporting the City Clerk. This brief, which we prepared, was joined in by the New York Civil Liberty Union, the American Jewish Committee, the American Jewish Congress, the Catholic Interracial Council, the Protestant Council, the NAACP, the Urban League of Greater New York and CORE.

Since this story will grow in importance, I want the TIMES to be aware of the facts so that further stories will properly acknowledge our role.

Cordially,

Marvin Rich
Executive Director

MR:jd

filed memo c̄ City Clerk July 29

similar arguments aug 5

Filed amicus brief aug 9

August 10, 1966

Mr. John Storm
National Desk
The New York Times
229 West 43 Street
New York, New York

Dear Mr. Storm:

I want to express my dismay on the TIMES' coverage of the PBA suit. As you know, SEDF lawyers prepared the memorandum of law challenging the validity of an initiative. The regulations we submitted to the City Clerk, Herman Katz, were those used in invalidating the initiative.

Later, when the PBA appealed his decision, we prepared an amicus brief supporting the City Clerk. This brief, which we prepared, was joined in by the New York Civil Liberty Union, the American Jewish Committee, the American Jewish Congress, the Catholic Interracial Council, the Protestant Council, the NAACP, the Urban League of Greater New York and CORE.

Since this story will grow in importance, I want the TIMES to be aware of the facts so that further stories will properly acknowledge our role.

Sincerely,

Marvin Rich
Executive Director

MR:jd

August 10, 1966

Mr. Bernard Weinraub
The New York Times
229 West 43 Street
New York, New York

Dear Mr. Weinrud:

I want to express my dismay on the TIMES' coverage of the PBA suit. As you know, SEDF lawyers prepared the memorandum of law challenging the validity of an initiative. The regulations we submitted to the City Clerk, Herman Katz, were those used in invalidating the initiative.

Later, when the PBA appealed his decision, we prepared an amicus brief supporting the City Clerk. This brief, which we prepared, was joined in by the New York Civil Liberty Union, the American Jewish Committee, the American Jewish Congress, the Catholic Interracial Council, the Protestant Council, the NAACP, the Urban League of Greater New York and CORE.

Since this story will grow in importance, I want the TIMES to be aware of the facts so that further stories will properly acknowledge our role.

Sincerely,

Marvin Rich
Executive Director

MR:jd

August 11, 1966

Theodore Ellenoff, Esq.
Rhonda L. Goodkin, Esq.
American Jewish Committee
165 East 56th Street
New York, New York 10022

Dear Friends:

Enclosed please find one of the briefs which I have submitted to Mr. Justice Saypol, of the Supreme Court on your behalf on Tuesday, August 9th, 1966. You will note that certsin changes were made from the draft which you received, and we hope that you will feel that they constituted improvements. All were suggested by "amici".

The brief in the Conservative Party case, not enclosed (Maria Monplaisir, Michael J. York, and Lars Ekwurzel v. Herman Katz) was similar, and will be forwarded in a day or two.

Whatever the decision of the Supreme Court, it appears likely that an appeal will be taken to the Appellate Division. We are currently redrafting the briefs and merging them with that in mind. Because this is an election matter, the appeal will be brought on very quickly -- probably early next week. It is, therefore, extremely important that we discuss your suggestions for changes in the brief as soon as possible.

In any event, please let us hear from you soon. We look forward to further cooperation with you on this and other matters.

Sincerely,

SM/cs
En.

STEPHEN M. NAGLER
Assoc. General Counsel

August 19, 1966

Dr. George Hallett, Jr.
Citizens Union
5 Beekman Street
New York 38, N. Y.

Re: Defense of the Unlimited Initiative
in Cassese v. Katz

Dear Dr. Hallett:

In accordance with my statement during our telephone conversation, I sen you the within summary of matters respecting the above issue, in the hope the Citizens Union will appear Amicu Curiae in the Court of Appeals in the above suit to defend the law allowing unlimited use of the initiative.

As you know, the Corporation Counsel, representing City Clerk Katz, has been attempting to revive the doctrine stated in ATWOOD V. COHEN, 291 N. Y. 484 (1944). In that case the Court of Appeals held that an initiative proposal, promoted by New York City policemen and firemen, to provide a bonus for those who had done or were doing military service, which would have cost about $13,000,000 per year, was not within the scope of matters allowed to be legislated locally by initiative. The Court of Appeals opinion in Astwood declared that in enactment of the City Charter and Administrative Code, by the special act of the Legislature in 1936 and 1937, the Legislature clearly showed the intendment that the Charter shall contain borad general matters of local government, and that details of administration shall be kept in the Administrative Code. The Court of Appeals found the bonus proposal was not related directly to matter in the then existing Charter, and was not really germane to it, as well as being a matter of administrative detail..

Shortly after Astwood was decided, Sections 2 and 19-a of the City Home Rule Law was enacted which provided that:

> "A charter amendment may be of any extent and may deal with any number of subjects."

Whatever may be the answer to the question of whether the term "any extent" meant that "administrative details" could now be legislated into the New York City Charter by the 1944 amendment, it is clear that the theory underlying the Astwood case has no binding force locally because of an entirely different home rule provision. The question of what may or may not be put into a local government charter is solely a question of local government, whether such matter is defined by a special act of the legislature, upon initial grant of a charter to the locality, or re-enactment of a Charter once granted as amended by the Legislature, or whether the charter be locally adopted or amended by the people in a locality. There is no general law of the State of New York that prescribes what form of law codifications any municipal government shall employ. No general law states that cities shall have "short form" or "long form charters". The definition of this matter is wholly and exclusively the product of special statute or local law.

In Art. IX, Sec. 3(d)(1) a "general law" is defined as one "which applies alike to all. . . cities. . . ", and in Art. IX, Sec. 3(d)(4), a "special law" is defined as one "which applies to one or more, but not all. . .cities. . . " In this precise definition of terms Art. IX, Sec. 3(c) provides:

> "In addition to powers granted in the statute of local governments or any other law (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government, and (ii) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this contitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government: (1) The powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of its officers and employees. . . ". . (3) The transaction of its business. . . "

Since the alleged intendment of the Legislature, relied on in Astwood v. Cohen, alleging that the Charter shall contain broad general powers, and the Administrative Code shall contain "administrative details" is merely a matter of local government, a matter of how the legislative business of the local government shall be ordered or codified, it is plain that nothing said by the Legislatue in the special laws passed by it in 1936 and 1937 can bind contrary action or intendment by the local government.

As is well known, many, many local governments choose to establish "long form"charters. No general law prevents any locality in this State from using the "long form" charter. No general law compels any locality, including New York City or any cities, to use a "short form"charter. Only a special law does this, and the special law intendment found, by a mere inference, or by hints of the legislature, (See L. 1936, ch. 483, Sec. 2) and such special law intendments are not binding upon the locality which may by a local law supersede such special act intendment. Sec. 2(1), Municipal Home Rule Law defines, for the purpose of that set of coded laws, that a "Charter" is a "statute" or "local law" which, among other things "includes the fundamental provisions defining, extending or limiting its corporate powers or affecting the framework of its government", but not the most rabid of anti-initiative-ists will contend that by this provisions the word "includes" is synonymous with the term "limited to".

What is true is that the Corporation Counsel is attempting to use the special intendment declared by the Court of Appeals in Astwood to allege that insofar as New York City is concerned, because it once had a special statute ordained "short form" charter is that the word "includes" does mean "limited to". Of course special statutes do not amend general laws, unless the existance of special circumstances of necessity or peculiarity of locality itself so allow. The form of a charter is not such a thing, and, in any event, because of the constitutional allowance to the locality to supersede special acts, such could not in any case be controlling.

I am informed by some civil rights people that I have done them harm because I will not stand by for their use of the old discredited Astwood case doctrine in this instance. I am too fully aware of the long struggle that those in the good government movements waged for the initiative, to allow this good thing to be undone. I do not believe the membership of any of the groups who were in Amicus support of Corporation Counsel would approve of the Amici acts of condemning the broad power of initiative. That by the initiative legislation that is distasteful to one may be enacted is no more a cause to abolish the initiative than is the enactment of bad legislation by a legislative body cause for abolition of the power of a legislative body. This thing of throwing out the baby with the bath water, because the bath water is dirty, is a flip thing to do. It is too bad that we do not have a greater use of the initiative in local affairs, for by such a process the electorate is caused to pay serious attention to matters of their own government, whereon they receive an education not otherwise attainable.

In concluding, I wish to return to the subject of the meaning that must be accorded to Sec. 2(2), Muni. Home Rule Law, defining the term "Charter Amendment" as "A new charter or any change in an existing charter presented as such under authority of this chapter or any state statute or charter. A charter amendment may be of any extent and may deal with an number of subjects." In the argument on CASSESE V. KATZ, much ado is made by both the Corporation Counsel and the attorneys for CASSESE about the legislative history of this provision, as promoted by Tom Desmond. All this legislative history is uncalled for, and should not, in the premises of the statutory provision itself, not be referred to.

It is well-settled that one may not, in any case without priorly meeting cert ain conditions, rely on legislative history for the meaning of a law. One can only use the legislative history of an enactment, for the ascertainment of the intent of the law, if the language of the law itself is ambiguous.

> "Where the words)of a statute) are plain, there is no room for construction (of the statute)."

OSK LINES V. UNITED STATES
300 U. S. 98, 101
81 L. ED. 532

PACKARD MOTOR CAR CO. V. N.L.R.B.
330 U. S. 485, 492
91 L. ED. 104

EX PARTE COLLETT
337 U.S. 55, ___
93 L. ED. 1207

UNITED STATES V. ROSENBLUM TRUCK LINES
315 U. S. 50, 55
85 L. ED. 536, 543

FIDELITY & DEPOSIT CO. V. ARENZ
290 U. S. 66, 89
78 L. ED. 32

CRANE V. COMMISSIONER OF INTERNAL REVENUE
331 U. S. 1, 6
91 L. ED. 130

ADDISCON V. HOLLY-HILL CO.
322 U. S. 607, 617-8
89 L. ED. 1422

BRUNER V. UNITED STATES
343 U.S. 112, 118
96 L. ED. 786

INSURANCE CO. V. RITCHIES
72 U. S. (5 WALL) 341

There is no ambiguity about the term "any". The term "any" is an "intensive adjective", specifying that every item falling within the generic term it qualifies is intended to be severally included.
It means "I. One indifferently out of two or more than two; or some indisicriminately, of whatever kind." WEBSTER'S THIRD INTL. DICTIONARY, G. & C. MERRIAM CO., 1961, 3rd Edit., p. 97. To the same effect see,

UNITED STATES V. WEIL
46 FED. SUPP. 323, 325 (DC Ark.

In this case the class term is "change in an existing charter presented as such under authority of this chapter (the Muni. Home Rule Law) or any state statute or charter," and "extent (of change in an existing charter presented as such under authority of this chapter or any state statute or charter".

Co rporation Counsel attempts to claim that because the Maylender v. Morrison case, which directly brought on the amendment was a case where the "changes" were of "large extent", so as to amount virtually to providing a new charter, that the word "any" must not be given its ordinary meaning, both big and small in thrust, but only a meaning as to allow similar gross changes in charters. Aprt from the matter that a new charter proposal itself may be defined as a "charter amendment", a matter which does not in the least create ambiguity, it is plain there is not the slightest amount of ambiguity in Sec. 2(2), MHRL. The "new charter" problem raised in Maylender was severed from the problem of "any change . . of any extent" by the language of Sec. 2. The "any change" and "any extent" matters stand alone in the text. These terms, therefore are plainly ultra comprehensive words and due, on their faces, to be accord their plain, ordinary intendment. There is no room for construction of them by reference to extrinsic histories.

The reason for this rule, that plain, unambiguous words are not subject to construction, unless something in the face of the text in which they are found indicates uncertainty and ambiguity is an important one. Laws, after all, are the product of a whole legislative body, and not the property of the few who worked on them in committees, or who particularly drafted them or promoted them. We look to the whole legislative body, who only sees the face of the bill on enacting them, for the meaning of the language. It is true that if in the plenary legislative debates, or the introduct ion of the bill by the committee chairman, that statements are made on the floor of the legislative body, and debate swirls over disputed terms, that special intents may be imputed to words, apart from their ordinary plain meanings. But the law could not tolerate a situation where drafters of a bill, by correspondence tucked into a bill jacket after it is enacted might have controlling power over the meaning of terms in the bill, different than those which would naturally assume to be in them by the ordinary person legislator who could only read the bill. ~~Wkm~~ Unless of legislation itself being enacted, or in existing statutes in *pari materia* indicates terms stated in a new statute are to be given special meanings, or are ambiguous, then the words must be taken at their ordinary face value under common usage.

There is no cause, in the language given in Sec. 2(2), MHRL, about "any change . . . (of) any extent", for there to be any construction of the meaning of the terms, so as to wipe out of their plain meaning the broad and comprehensive natures of the terms. Imagine, if you will, the jeopardy created to many a broadly phrased statute that would exist if one, claiming exemption from the statute need only go to legislative history, and, if he cannot find his particular kind of case enumerated in the legislative history papers, thereon claim exemption from the general inclusion! While at this time I do not find my case notes on this point, the case law is clear that when legislative bodies use general terms in statutes, especially with the qualifying term "any" or "every" or "all", etc., which are identical in meaning, then, in absence of something in the face of the enactment or statutes in *pari materia* indicating an ambiguity, or substantial intent to exclude a particular of the class, that the whole of the class, every particular to any degree falling within the class, must be deemed including.

Mr. Rachlin, of C.O.R.E right now litigates a very important question in the U.S. Supreme Court in which this very issue is involved, and it is surprising to see him not only engaged in attacking the position that liberals long fought for, for broad use of the initiative, but also engaged in trying to persuade the courts to allow repealers of particulars within general "any" qualified classes from the gambit of the general and inclusive term.

I have little doubt some of the old correspondence by the C.U., or to it, at about the time of the 1944, and 1957 amendments to the Home Rule laws will show that C.U. fought to broaden the initiative for use in every case where a local law may be passed. This is of great interest, but certainly should not be allowed to override the point that broad legislation that is unambiguous must not be subject to piecemeal repealer in the courts by the process of litigants claiming their particular case was *not* mentioned in the legislative history or debates.

Again, I do hope that you will not allow the good work of the past, for a broadened peoples' power of initiative, to be whittled down by the present hasty, self-centered concerns of those who are against the PRA. We need not make progress at the expense of past progress.

Sincerely yours,

JOHN M. LAWRENCE

cc.: Sen. Kennedy
Repr. W. F. Ryan
M. Marcus, Esq.
G. Perrin, Esq.

8-23-66

August 19, 1966

Mr. Floyd McKissick
Natl. C.O.R.E.
38 Park Row
New York, N. Y.

Dear Mr. McKissick:

I am writing you, enclosing a copy of a brief that I submitted to the Appellate Division, in opposition to a point that C.O.R.E has been promoting, in the matter enttitled CASSESE V. KATZ, to protest C.O.R.E. stand in opposition to a broadened power in the local citizenry to commence legislation by initiative.

For many years the liberal peoples fought quite hard, against the vested interests, to establish the right of initiative. The Citizens Union, among others in the good government forces, work quite lengthily to place in the peoples' hands the power to bring about local legislation directly. Time after time the reactionaries, incontol of the courts, used various strategems to deprive the people of this power. The last of these was in 1944, in the case of ASTWOOD V. COHEN.

Now I find that C.O.R.E is engaged in using the police review board matter as a vehicle to resurrect the discredited doctrine of ASTWOOD. We do have presently a rather reactionary court in the Appellate Division, First Department, and in the Court of Appeals. There is some possibility that these courts, seeing the political posture of liberal groups, might be inclined to revitalize the doctrine of ASTWOOD. I brlieve that C.O.R.E is doing a grevious disservice to the cause of human progress by tending to bring this about. Civil rights for all does not need to come at the expense of popular democracy.

I shall do all I can, with my frirends in C.O.R.E and elsewhere, t o put an end to what is going on. The C.O.R.E. attack on liberalized use of the initiative does not, I believe, represent the considered view of C.O.R.E members or civil rights people in general. I trust you can persuade Mr. Rachlin to discontinue not only the C.O.R.E. attack on the principle of broad availability of the initiative, but to efforts to induce other civil rights and civil liberties groups to go along with the attack on the initiative.

Sincerely yours,

John M Lawrence

J.M. LAWRENCE
57 W. 10 St.
NYC 11, N.Y.

August 25, 1966

Mr. John M. Lawrence
57 West 10th Street
New York, New York 10011

RE: Cassese Vs. Katz

Dear Mr. Lawrence:

Thank you for your letter of August 19th regarding the legal position taken by CORE in the above named case.

We are referring this matter to our Attorney, Carl Rachlin who, I know, will appreciate having the information which you have volunteered.

Very truly yours,

Floyd B. McKissick
National Director

FBMcK/ilh
CC: Carl Rachlin

John M. Lawrence
57 West 18th Street
New York City 11, N. Y.
GRamercy 7-1826

August 28, 1966

Samuel Smoleff, Esq.
50 Broadway
New York City, N. Y.

Re: Citizens Union Amicus Curiae in the
Court of Appeals in
CASSESE V. KATZ and MONPLAISIR V. KATZ
re. Initiatives

Dear Mr. Smoleff:

As you have observed, the Appellate Division returned its decisions on the appeals in the above entitled cases late Friday. As yet I have been unable to obtain a copy of the majority and minority opinions. However, it is plain from what does appear in the press, that the Appellate Division has de facto rejected the argument of the ASTWOOD case by a 3 to 2 vote. The TIMES relates as follows:

> "The majority opinion held that 'it would appear' that the City Charter 'may be validly amended by the procedure of initiative and referendum if the proposed local law, whether of a legislative or administrative character, alters or changes any provision contained in the charter'. . . . (and) that the review board 'related to the authority granted to the (Police) Commissioner by the provisions of the Charter and alter or change them by restricting his authority'".

The Appellate Division majority seems to say that the slightest matter of curtailment of the powers of a City officer may be made the subject of a Charter amendment, and it is obvious that where affirmative proposal shall specify that a City officer must do a specific thing, or do a specific thing in a specific way, such a matter necessarily involves an element of such curtailment, so that for practical purposes the majority's opinion is de facto overruling of Astwood.

But, as the minority opinion stated by JJ. Stevens and Rabin shows, there is still some probability that the Court of Appeals might be persuaded to hold differently. Mr. Neier of N.Y.C.LU. was on an NBC-TV broadcast Sunday morning, August 28th, and it appears that the Civil Liberties Union, and its associated groups, who have heretofore being appearing in CASSESE V. KATZ and MONPLAISIR V. KATZ as Amici Curiae in support of the Astwood doctrine, shall persist in such support in the ~~Appellate-Div~~ Court of Appeals.

The Citizens Union long fought to secure to local voters a plenary right to use the Initiative to directly enact any matter comprehensible by local legislation directly into the law. Now the coalition of civil rights and civil liberties organizations, led by C.O.R.E. and the N.Y.C.L.U. are trying, by representing to the Courts the political powers of their organizations, to annul the initiative rights of the local electorate.

Where the Corporation Counsel in its briefs has confined itself to arguing against free availability of the initiative on the grounds (1) that civil service workers would be able to place many matters on the ballot seeking overruling of the determination of elected or appointive officers, and (2) that the initiative method does not offer sufficiency of deliberative processes, Mr. Neier now grossly attacks the initiative method because partisans for some particular measure may engage in misrepresentation and demogoguery to secure passage of the measure. This latter attack is nothing less then a full-scale attack on the entire democratic electoral process, reminisent of the ancient attacks of the Federalists of old who sought to keep property owner qualifications upon the rights of electors, uring that the common citizenry were too illiterate to be able to judge candidates and issues.

There can be no doubt that the course of conduct that the lawyers for C.O.R.E. and N.Y.C.L.U. are pursuing, of trying to deprive local voters of liberal use of the initiative, do not represent the political views of the overwhelming number of their own supporters. The old line progressives, the liberals, and all in the reform and good government movement have been long dedicated to securing maximal availability of the initiative process. It is a salutary system of checks and balances against excesses and irresponsibilities of, or corrupt or special-interest services of, elected legislators. Dr. Hallett and Mr. Bergerman indicate that the Citizens Union will stand up in the Court of Appeals against the position that Neier and Rachlin are trying to sustain, and oppose their efforts to do away with the extant right in the local citizenry to enact what they choose by the initiative. It would be a tragedy if, due to the shortsightedness of Mr. Neier and Rachlin that the hard won gain of free citizen use of the initiative is destroyed. It appears to me that such can only happen if there is not sufficient representation in the Court of Appeals by liberal and progressive forces showing the people are not for their hard won right being taken away.

There are additional reasons why it is indispensable that Citizens Union not allow the Neier and Rachlin views to go unchallenged by other liberal forces in the Court of Appeals. Such views as they allege, are being alleged in bad faith, and by deliberate misrepresentation of the law. As was long ago noted in PRINCE'S CASE, 8 COKE 13b, 77 ENGLISH REPORTS 496, "whatever the matter with reference to which an Amicus Curiae undertakes to inform the Court, he should act in good faith, make full disclosure on the point, and suppress nothing with intent to deceive the court." This is similar to the Canon of the American Bar Association that imposes a duty on attorneys to fairly, accuratedly and bona fidely present propositions of law in argument.

The Neier and Rachlinnarguments in support of the doctrine of ASTWOOD are founded upon bad faith averments of state of the law, as shown as follows:

1. Neier, at least, claims that the PBA's bill is not limited to the mere matter of specifying the character of persons, to wit, police department employees with at least one year of service, who can be members of the Police Department's advisory review board. Rather, in accordance with the construction I first showed, he claims that the PBA's bill shall effect implied repealers of the powers of the City Council, and many other officers and agencies of the City government to independently investigate the personnel and affairs of the Police Department. This being so, it is manifest that in continuing to support the ASTWOOD case

doctrine, he is engaged in deliberately misrepresenting to the Court of Appeals the intent of the PBA's bill, as he truly understands it. For, the argument advanced in favor of the ASTWOOD case doctrine ride solely on the claim that the PBA's bill merely affects the "administrative detail" change of specifying the character of persons as aforesaid who may serve on the Police Department's review board. When N.Y.C.L.U. disbelieving that this is the intent of the PBA's bill seeks to gain judgment keeping that bill off the ballot, by claiming what it does not believe is actually so, this is misrepresentation. In no instance have Neier or Rachlin claimed the matter as alternative argument, nor, in any case have they been compelled to alleged such, by reason of necessity, as alternative argument. Rather they have been appearing in Court alleging as the true intendment of the PBA's bill matter they do not believe to be so. Is it not an anomolous situation where Mr. Neier argues the voters ought to be deprived of power to direct legislation, because partisans for an initiative matter may represent the nature of a bill they support, while he concurrently seeks to have that very bill kept off the ballot by misrepresenting the nature of that bill! Ethics, like justice, is indivisible, and no respector of persons, and the liberal cause gains nothing by asserting immunity from the moral imperative.

Again, Dr. Hallett, who drafted the 1944 Amendment to the City Home Rule Law, (now Sec. 2(2), Municipal Home Rule Law) has stated that when he authored the terms "any change. . . of any extent" respecting what constituted matter that might be the subject of a Charter amendment, such was framed with the express purpose of overcoming the rule of ASTWOOD, and allowing any detail matter of local government to be enacted by the Charter amending initiative under Sec. 37, MHRL. Additionally, an inspection of Sec. 2(2), and the text of the 1944 original enactment, will show that that enactment is free of any inderent ambiguity. As I have heretofore noted, there is utterly no warrant for construction of a statute, by reference to extrinsic materials, where the face of the statute, its text, does not evidence ambiguity of terms, or lead to absurd results.

> "A statute is not open to construction as a matter of course. It is open to construction only where the language of the statute requires interpretation, that is, where the statute is ambiguous, or will bear two or more constructions, or is of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning. Where the language of a statute is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation, and the court has no right to look for or impose another meaning. In the case of such unambiguity, it is the established policy of the courts to regard the statute as meaning what it says, and to avoid giving it any other construction than that which its words demand. The palin and obvious meaning of the language used is not only the safest guide to follow in construing it, but it has been presumed conclusively that the clear and explicit terms of a statute expresses the legislative intention, so that plain and obvious provisions must control. A plain and unambiguous statute is to be applied and not interpreted, since such a statute speaks for itself.
>
> 50 AM. JUR., Statutes, Sec. 225, pp204-207 and cases cited.
>
> "In the construction of a statute, the general rule is that the court may write no limitations therein. As

variously expressed, the statute may not be restricted, constricted, qualified, narrowed or abridged. Hence, general words are to have a general operation where the manifest intention of the legisltaure affords no ground for qualifying or restraining them. Under this rule, where the statute is expressed in general language, it is to be applied to all cases coming within its terms, even though the law originated in some case or class of cases which maw in the mind of the legislature at the time of the enactment. (Citing among others BARR V. UNITED STATES, 324 U. S. 83, 89 L. ED. 765, 65 S. CT. 522; BURGE V. COMMISSIONER, (CCA 4)253 FED. 2d 765, 74 ALR 2d 664.) The legislature will be presumed to have intended no limitation to a statute in which it has included by general lenguage many subjects, persons or entities without limitation. However, general terms are not necessarily to be regarded of universal application, and a statutory provision is not necessarily unlimited because expressed in genreal words without terms of limitation. In particular cases it may appear that a statute or section thereof was intended to be limited, restrained or restricted. The precise words of a statute may be restricted where that is necessary to obviate repugnancy or inconsistency, and give effect to the manifest intention of the legislature, as discovered by the sound principles of interpretation, and to carry out the general scope and purpose of the act."

50 AM JUR, Statutes, Sec. 230, pp. 217-218.

There is no ambiguity in the text of the 1944 amendment to the City Home Rule, an present Sec. 2(2), Muni. Home Rule Law. Not even the most rabid proponent of the ASTWOOD theory would claim that City Charters cannot contain matters of detailed local government, or that the provision of Sec. 2(1), MHRL which defines a Charter as a matter of law which "includes the fundamental provisions defining, extending or limiting its corporate powers or affecting the framework of its government" can be interpreted to mean that a Charter can only contain broad and general matter. And, if it is true, as all must admit, where most local charters are "long form" and contain detailed matters, that detailed matters may be in locality charters, then none can in good faith claim the term "charter amendment", as defined in Sec. 2(2), MHRL prohibits amendatory matter concerning details of government, which are already allowable in charters.

I specifically note these matters of the actual intent of Sec. 2(2), MHRL, as such was authored by Dr. Hallett, and the rules of law that forbad the unwarranted fishing expeditions that the Corporation Counsel and the civil rights groups by their Amici lawyers have indulged in, because such further illustrates the bad faith, and unethical conduct involved in these people advancing the ASTWOOD argument. I do not say that when the civil rights Amici first laid out their Astwood arguments in the Supreme Court, before Judge Saypol, that they acted in bad faith. But their bad faith was involved in their arguments before the Appellate Division. As I have previously noted, citing PRINCE'S CASE, supra., an Amicus has a responsibility that attorneys for litigants do not have. No attorney for a party is bound to come forward affirmatively with arguments of law to impeach his case theory. He is only bound to not advance law arguments he cannot credit. But Amici hold an entirely different status. They are solely allowed to appear upon the theory of being disinterested persons, and are bound by the rule of constructive fraud. They cannot "suppress matters", either actually or constructively, by advancing law propositions tending to impeach valid law that is in issue. No Amicus has the right to appear for partisan purposes, but as to every issue arising his sole stand can be upon the true state of the law..

I am thoroughly disgusted with the "cleverness" (that is the way one of the lawyers in the civil rights clique described their use of the ASTWOOD doctrine to bar the PBA bill from the ballot) in being willing to annul the hard won right of unlimited use of the initiative, and to do so by the use of specious propositions of law. No one has so much suffered from abuse of judicial authority, by courts whittling down the broad intendment of constitutional and legislative provisions providing popular rights, as have those who nurture the civil rights movement. PLEASY V. FERGUSON, that enunciated the "separate but equal doctrine" was the most notorious case of this kind. At present both AC.L.U. and C.O.R.E. are litigating cases in the U.S. Supreme Court respecting the issue of immunity under the Civil Rights Act of 1871. There various governmental officials in the States are claiming immunity from suits for money damages for tortious acts done under color of State authority. The law specifies that "any person acting under color of State authority" shall be liable for damages, and the immunity seekers have consistently had the courts find exemption for them from the general terms of the unambiguous law. I do not believe it is a small matter when civil rights lawyers will themselves ask the courts to indulge in illegal excesses, but the disregard of the fundamental laws of construction.

The civil rights lawyers have taken quite some umbrage at my raising of the question of ethics in what they are doing in their support of the Astwood case doctrine in the litigation in CASSESE V. KATZ. They seem to think that they are exempt from the moral imperative because the issues involved are intricate, and the ordinary person can not easily understand them. Their amorality is not a matter of inconsequence. For what they are urging is a right to be dishonest when the masses of people cannot understand the issues easily. They are saying that when the issue is not easily ascertainable by the public, they may be dishonest. If they hold to this view, then it is plain one ought not trust them in any situation where their ways are not easily scrutable.

If we who are in reform movements lose our regard for moral integrity, we lose all hope for a world of peane and justice. If we begin relying upon sophistry to undermine the settled law, we destroy regard for law itself, which is the only means by which a just world may be created. If we let lawyers lead us into using foul means to win worthy ends, then we may be sure that victory goes to the predators and connivers of the world.

I for one intend to lay out these kinds of matters in such papers that I shall supply to the Court of Appeals, if the civil rights groups continue to misrepresent to the Court of Appeals that people in the civil rights movement are for destroying the local peoples' right to the liberal use of the initiative. I trust the Citizens Union will do what it believes is desirable to help preserve that right.

Sincerely yours,

JOHN M. LAWRENCE
57 WEST 10TH STREET
NEW YORK CITY 11, N. Y.

AUG 30 1966

August 28, 1966

Mr. Floyd McKissick
Natl. C.O.R.E.
38 Park Row
New York 38, N.Y.

Core

Dear Mr. McKissick:

I am advised that C.O.R.E. shall continue on its merry way to trying to impair the right of the local electorate to broad use of the initiative in an attempt to keep the PBAS bill off the ballot. The devastating effect of this anti-populist endeavor is already apparent, but it appears the 'leaders' have determined to go ahead at all costs.

In the enclosed copy of a letter to the Citizens Union, I set out the unethical nature of the arguments that C.O.R.E. is using.

Persuasion having failed, it is time now to take on a direct public fight about the matter. I do not believe the rank and file of C.O.R.E., acquiring knowledge as to the issue, will support the course that you and Mr. Rachlin are pursuing.

Sincerely yours,

John M Lawrence

JOHN M. LAWRENCE
57 WEST 10TH STREET
NEW YORK 11, N. Y.

Copy ✓
Kit

Citizens Union
5 Beekman Street
New York, N.Y. 10038

August 29, 1966

Memorandum on City Home Rule with Special Reference to the Charter Initiative as Involved in the Civilian Review Board Referendum Case

by George H. Hallett, Jr.
Executive Secretary and Legislative Representative
of the Citizens Union

For the last forty years, approximately, municipal home rule has been one of the major concerns of the Citizens Union. The Citizens Union has participated actively in all of the legislative activity in that field in New York State and has been responsible for much of the actual language now on the statute books, including the language involved in the current civilian review board referndum case.

For the past 32 years and 8 months I have been the executive secretary of the Citizens Union and, with the exception of the year 1962, have been its legislative representative at Albany. During all this time I have been active for the Citizens Union in relation to home rule legislation. Among the enactments of which I was the principal draftsman are the county government provisions of the constitution adopted in 1958 which were prepared originally for the Uniform County Laws Commission and were largely taken over by the new local government article adopted in 1963, the 1939 general revision of the City Home Rule Law (Chapter 867) which was largely taken over by the new Municipal Home Rule Law adopted in 1963, the 1964 rewriting of the city charter commission provisions of the Municipal Home Rule Law (Chapter 592) and, specifically, the 1937 charter initiative provision (formerly Section 19-a of the City Home Rule Law) which was included in the 1939 revision, and the rewriting of that section which was adopted in 1957 and re-enacted in section 37 of the Municipal Home Rule Law.

Our constant objective has been not merely to give municipalities control of their own destinies so far as consistent with the welfare of the state as a whole but also to give the people of a municipality the right to determine their own form of government instead of being completely at the mercy of their elected representatives. When limitations have been placed on legislation secured for this purpose, either by the courts or by the legislature, we have generally been successful in getting these limitations removed by later legislation.

We have always known that the people can make mistakes, as alleged by the opponents of a broad construction of charter initiative powers, but so can legislative bodies, and sometimes the mistakes of legislative bodies run counter to the best interests and even the known desires of the people they are elected to represent. We have believed there should be a right of appeal to the people themselves in basic matters under proper procedural safeguards and that the decision as to what is to be considered basic should also be subject to popular decision upon substantial popular demand. It has been our intention to give the people as much leeway in changing their basic laws as their representatives have on their behalf and we believe the present legislation governing the powers of cities in this state meets that objective and should be so interpreted. If the people make mistakes under their home rule powers, they can also undo them.

The right of the people of a city to amend their city charter by petition and popular vote was first granted by Chapter 479 of the Laws of 1937. This law had its genesis in a state conference on legislation attended by representatives of civic organizations and political science faculties at Union College, Schenectady, in July 1936 under the auspices of a New York State Committee of the National Municipal League with the cooperation of the Citizens Union and the Schenectady Bureau of Municipal Research. The conference adopted a short legislative program of measures affecting the structure and operating methods of government, developed plans for citizen action to support it, and created a drafting committee to prepare bills for introduction, of which I was a member. Since the National Municipal League does not engage in lobbying activities, I was delegated as the Albany representative of the conference to try to secure the program's enactment.

The charter initiative was the only item with which we were immediately successful. (Others followed later.) The chief reason for this success was the dissatisfaction of the Conference of Mayors with the working of legislation secured earlier for the adoption of alternative forms of government such as the city manager plan by petition and popular vote. The dissatisfaction was not with the new forms made available but with the resulting combination of provisions from the alternative forms and from that part of the old city charter which remained as a city's basic law after an alternative form was adopted. The officials of the Conference of Mayors were trying to repeal the alternative forms so as to secure unified city charters in a single unambiguous document. They agreed as a condition of repeal to accept a broad power for any city to amend its own charter by petition and popular vote if a sufficiently safeguarded procedure could be devised. They were afraid of the possibilities of unskilled draftsmanship in amendments submitted by petition. While I noted, on the basis of my earlier experience on the staff of the National Municipal League as well as the Citizens Union, that people who are contemplating the trouble and expense of a petition campaign usually protect their investment by employing competent draftsmen, I agreed with them that any reasonable precaution which would not limit the purpose of the legislation should be taken. I was able to satisfy them by proposing the two-petition arrangement which is still on the statute books. A first petition would bring the initiated proposal before the city's legislative body. If it contained errors in drafting or ill-considered details which the legislative body could change without defeating the purpose of the petitioners, the legislative body was to have two months time in which to adopt such a revision and submit it to the voters if the subject matter required a referendum. If the legislative body failed to do this to the satisfaction of the petitioners or to adopt the initiated amendment as its own, an additional petition with new names could force the initial proposal onto the ballot.

With the approval of the Conference of Mayors the legislation was adopted in this form. It was intended to give the people of a city broad powers to put into their city charters whatever they considered appropriate, with machinery for avoiding inadvertent mistakes but without limitation as to subject matter. The Citizens Union noted at the time, in its printed report on the legislative session of 1937, that "this new measure gives all the cities of New York State powers comparable for the first time to the powers of Ohio, Michigan and California, under which Cincinnati, Toledo, Berkeley and others of the country's best-governed cities adopted their present charters." The scope of charter-amending in these other states is not limited in any such way as is now being proposed by some in the current litigation.

Subsequently three limitations on New York's home rule powers were imposed, two by the courts, the other by the Legislature. All were removed, with one minor and unobjectionable exception, by later legislation proposed by the Citizens Union.

The first limitation resulted from the attempt of a local taxpayers' group in Johnstown to adopt a manager plan revision of their city charter by petition and popular vote. Considerable parts of the existing charter were left unchanged, but since the city manager replaced the mayor for administrative purposes in most parts of the charter the whole charter was reproduced in the petition for convenience of the readers with the omissions and additions indicated in standard amending form. This corresponded to bills frequently passed in the legislature under the title of an act to amend a particular law generally. The courts, however, in the case of Maylender v. Morrison, 260 App. Div.892,22 NYS 2d 555 (3rd Dept. 1940) aff'd. 284 NY 575 (1940) held that this was not a charter amendment because it could be construed to be a new charter. Lawrence Arnold Tanzer of the Citizens Union's executive committee, who was recognized as one of the foremost authorities on city home rule, argued in court that whether it was a new charter or not it was a charter amendment in prescribed amendment form. When the courts ruled otherwise the Citizens Union secured amendments to the City Home Rule Law (Chapter 602 of the Laws of 1944) to apply the charter initiative machinery to "a local law amending a city charter, however extensively," and providing:

> "The term 'charter amendment' means any change in an existing charter presented as such under authority of this chapter or any charter or state statute. A charter amendment may be of any extent and may deal with any number of subjects. A proposal presented as a charter amendment shall not be rejected as such on the ground that it constitutes a new charter."

While this bill was pending a decision came down in another case, Astwood v. Cohen, 291 NY 484 (1944), invalidating a New York City initiative to provide a salary bonus for policemen and firemen on the ground that this was not a real charter amendment to a "short form charter, setting forth the structure of the City Government and the manner in which it is to operate" and belonged in the Administrative Code. We were well aware of this decision and were troubled by it because of its implications even though we disapproved of the particular use to which the charter initiative had been put in this case. We did not think it necessary to change the wording of our bill to meet it, however, because while the initial occasion for the bill was the Maylender case with its limitation of a particular kind on the subject matter of a charter amendment, the wording of the bill seemed broad enough to cover other kinds of limitations and to emphasize the intent of section 19-a that the subject matter was not to be limited.

This intent was reinforced by the subsequent recodification of the Charter initiative section enacted in 1957 with equally broad language, including the adoption of a new charter, (Chapter 1027) and by the 1963 enactment of the Municipal Home Rule, which substantially re-enacted in section 37 the earlier provisions for initiative adoption of "a local law amending a city charter (however extensively) or providing a new city charter."

The third limitation was a legislative one, against which the Citizens Union protested, in 1951 (Chapter 721). Because the charter initiative procedure had been used in some cases to prescribe specific salaries in city charters (a departure from good practice of which the Legislature as well as petitioners had often been guilty), the charter initiative section was amended to require that when a new expenditure of money is required by an initiated charter amendment, " a plan to provide moneys and revenues sufficient to meet such proposed expenditures" must also be provided. Possible serious effects of this amendment, going beyond the particular occasion for it, were removed by a Citizens Union amendment providing that "This restriction shall not prevent the submission of a local law to adopt a new city charter or to reorganize the functions of city government, or a part thereof, relying partly or solely on normal budgetary procedures to provide the necessary moneys to meet the expenses of city government under such reorganization, whether or not such reorganization includes the creation of new offices, provided only that such reorganization shall not require specific salaries or the expenditure of specific sums of money not theretofore required." This language is now found in section 37, subdivision 11, of the Municipal Home Rule Law. Note that it contemplates the submission of charter amendments reorganizing any part of the functions of city government.

Turning to the present attempt to amend by petition and popular vote the procedures for looking into charges against the police, this is certainly a proposed reorganization of part of the functions of city government. This would be true even if it did not modify any provision of the present charter, but were merely an addition to it.

The purpose of the state's present city home rule machinery, as developed over the years, is to give the electorate the last word as to what goes into a city charter and what may be left to implementing local laws or ordinances. What may seem incidental to a particular legislative body or judge may seem of fundamental importance in particular circumstances to a majority of the electorate. If a limitation on police review boards may not be placed by charter initiative in the New York City charter, then the requirement of a civilian review board may not be placed in the charter of another city by initiative procedure, and such a requirement may seem just as basically important to the people of another city as it does under present conditions to many of us here in New York.

The Citizens Union will do its utmost to defeat the proposal to outlaw a civilian review board at the polls, but that is the proper forum for decision. To deny the required number of petitioners the right to get a vote on the subject would be to limit drastically the scope and utility of the home rule powers which have been asserted and reasserted over the years by the Legislature of the State of New York.

September 1, 1966

Mr. John M. Lawrence
57 West 10th Street
New York, New York 10011

Re: Cassese v. Katz

Dear John:

I have your letter to Floyd McKissick dated August 19th which Floyd turned over to me for response. I appreciate the purposes which guided you to write this letter and your interest in the entire proceedings. I must confess, however, that I see the problem in a somewhat different fashion. Initiative cannot and should not be a substitute for representative government. In my view, representative government is every bit and can be every bit as democratic as other forms of legislating. New York City is not a small New England town and cannot be treated in the same way. Intelligent use of initiative and referendum is very significant. But unfettered, unrestricted use of initiative can lead to unintentionally, undemocratic results. Obviously, you would agree that people should not have the right to vote on limiting the constitutional rights of other citizens. So it is clear that initiative does not apply to every type of problem. In our view, it does not apply to this kind of problem which is purely administrative and ought to be handled in an administrative fashion. It is also, in our view, destructive of the kind of City Charter that New York City has, mainly the short form charter. For if your view were to pervail, administrative matters would be both in the Administrative Code and in the Charter itself - the very thing the new Charter was devised to protect against.

I have deep respect for George Hallett but in this matter I regretfully find myself on the opposite side. I hope it will not happen too often.

Sincerely yours,

CR:tp

Carl Rachlin
General Counsel

September 14, 1966

Gregory J. Perrin, Esq.
Catholic Interracial Council
30 Vesey Street
New York, New York

Dear Mr. Perrin:

Here, somewhat after the fact, is our brief for the Court of Appeals. Although the court granted our motion, they somehow managed to overlook the soundness of our argument and, as you know, ruled against us.

Thank you very much for cooperating with us. We look forward to entering future joint ventures with you.

Very truly yours,

Carl Rachlin
General Counsel

CR:tp
Encl.

September 12, 1966

ar Mr. Rachlin:

It is still my intention to
that the true story is laid out con-
ing the PB.A.'s bill, as it seeks to
ve all independent surveillance of
ce Department affairs by various
er officers of the City". But I
ot, and will not, give any support
he Lindsay plan, which has the same
cts in structure as the Philadelphia
ation, whose 'whitewash" nature is
rly apparent in their own figures.
.O.R.E. supports the Lindsay Plan
s pulling a great hoax on the people.

Sincerely yours,

John m Lawrence

M. LAWRENCE
EST 10TH STREET
YORK CITY, N. Y. 10011

September 14, 1966

Murray A. Gordon and
Marvin Karpatkin, Esqs.
American Jewish Congress
15 East 84th Street
New York, New York 10028

Gentlemen:

Here, somewhat after the fact, is our brief for the Court of Appeals. Although the Court granted our motion, they somehow managed to overlook the soundness of our argument and, as you know, ruled against us.

Thank you very much for cooperating with us. We look forward to entering future joint ventures with you.

Very truly yours,

CR:tp
Encl.

Carl Rachlin
General Counsel

September 14, 1966

Theodore Ellenoff and
Peter J. Strauss, Esqs.
American Jewish Committee
165 East 56th Street
New York, New York 10022

Gentlemen:

Here, somewhat after the fact, is our brief for the Court of Appeals. Although the court granted our motion, they somehow managed to overlook the soundness of our argument and, as you know, ruled against us.

Thank you very much for cooperating with us. We look forward to entering future joint ventures with you.

Very truly yours,

Carl Rachlin
General Counsel

Encl.
CR:lp

September 14, 1966

Robert L. Carter,
Maria L. Marcus and
Lewis M. Steel, Esqs.
National Association for the
Advancement of Colored People
20 West 40th Street
New York, New York 10010

Dear Sirs:

Here, somewhat after the fact, is our brief for the Court of Appeals. Although the court granted our motion, they somehow managed to overlook the soundness of our argument and, as you know, ruled against us.

Thank you very much for cooperating with us. We look forward to entering future joint ventures with you.

Very truly yours,

Carl Rachlin
General Counsel

CR:tp
Encl.

September 14, 1966

Arnold Forster and
Seymour Graubard, Esqs.
Anti-Defamation League of
Bnai Brith
315 Lexington Avenue
New York, New York 10016

Gentlemen:

Here, somewhat after the fact, is our brief for the Court of Appeals. Although the Court granted our motion, they somehow managed to overlook the soundness of our argument and, as you know, ruled against us.

Thank you very much for cooperating with us. We look forward to entering future joint ventures with you.

Very truly yours,

CR:tp
Encl.

Carl Rachlin
General Counsel

September 14, 1966

Alan Levine, Esq.
New York Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

Dear Mr. Levine:

Here, somewhat after the fact, is our brief for the Court of Appeals, Although the court granted our motion, they somehow managed to overlook the soundness of our argument and, as you know, ruled against us.

Thank you very much for cooperating with us. We look forward to entering future joint ventures with you.

Very truly yours,

Carl Rachlin
General Counsel

CR:tp
Encl.

September 14, 1966

Arthur Atha, Esq.
Office of Church and Race of the
  Protestant Council of New York
315 Fifth Avenue
New York, New York

Dear Mr. Atha:

Here, somewhat after the fact, is our brief for the Court of Appeals. Although the court granted our motion, they somehow managed to overlook the soundness of our argument and, as you know, ruled against us.

Thank you very much for cooperating with us. We look forward to entering future joint ventures with you.

Very truly yours,

Carl Rachlin
General Counsel

CR:tp
Encl.

PBA

September 14, 1966

Eugene Callendar, Esq.
Urban League of Greater New York
204 West 136th Street
New York, New York

Dear Mr. Callendar:

Here, somewhat after the fact, is our brief for the Court of Appeals. Although the court granted our motion, they somehow managed to overlook the soundness of our argument and, as you know, ruled against us.

Thank you very much for cooperating with us. We look forward to entering future joint ventures with you.

Very truly yours,

Carl Rachlin
General Counsel

CR:tp
Encl.

PETITION

Police

FOR THE SUBMISSION TO THE ELECTORS OF THE CITY OF NEW YORK OF A LOCAL LAW TO AMEND THE NEW YORK CITY CHARTER TO REQUIRE THAT ALL MEMBERS OF ANY REVIEW BOARD ESTABLISHED TO INVESTIGATE AND PROCESS CIVILIAN COMPLAINTS AGAINST POLICEMEN BE FULL-TIME MEMBERS OF THE POLICE DEPARTMENT, THEREBY PROHIBITING ESTABLISHMENT OF A REVIEW BOARD COMPRISED IN WHOLE OR PART OF CIVILIAN MEMBERS.

Pursuant to Section 37 of the Municipal Home Rule Law, we, the undersigned, qualified electors of the City of New York, do hereby petition for the submission to the electors of the City of New York at the next general election held not less than sixty days after the filing of this petition of the following local law to amend the New York City Charter.

A LOCAL LAW

To amend the New York City Charter in regard to the establishment of a procedure for handling civilian complaints against members of the Police Department.

Be it enacted by the People of the City of New York pursuant to the authority provided in Section 37 of the Municipal Home Rule Law as follows:

Section 1. Chapter 18 of the New York City Charter is hereby amended by inserting therein a new section 440 to read as follows:

§ 440. CIVILIAN COMPLAINTS AGAINST MEMBERS OF THE POLICE DEPARTMENT

(A) Policy: It is hereby declared to be the public policy of the City of New York inorder to preserve the integrity and independence of police service, that civilian complaints against members of the Police Department of the City of New York shall be investigated and dealt with fully and fairly by the appropriate officials regularly charged with the governance and discipline of the Police Department without interference by any person or group of persons not regularly in police service.

(B) Definitions: As used in this section

1. The term "Mayor" means the Mayor of the City of New York or any official acting on his behalf or in his place and stead.

2. The term "Commissioner" means the Police Commissioner of the City of New York or any official acting on his behalf or in h his place and stead.

3. The term "Police Department" means the Police Department of the City of New York.

4. The term "Civilian" means any person who is not a member or full-time employee of the Police Department.

(C) Review of Civilian Complaints: The Commissioner shall have the power to and may establish within the Police Department a review board to consist of one or more persons who shall serve at his pleasure , which board may have the power to receive, to investigate, to hear, and to recommend action upon civilian complaints against members of the Police Department , or any one or more of such powers, provided that each member o f such board is, and for a period of at least one year prior to his appointment to such board has been, a regularly appointed, full-time member or full-time administrative employee of the Police Departmet and shall continue to be a full-time member or full-time administrative employee of the Police Department during his period of service on such board. Neither the Mayor, the Commissioner, nor any other administrator or officer of the City of New York shall have power to authorize any person, agency, board or group to receive , to investigate, to hear or to require or recommend action upon civilian complaints against members of the Police Department except as provided in this section.

(D)

Attendance by Police Officers: No member of the Police Department or other person shall be disciplined or otherwise penalized for his failure to appear or before or respond to theinquiries of any person, agency, board or group appointed by the Mayor, the Commissioner, or any other administrator or officer of the City of New Yorkto receive, to investigate, to hear or to require or recommend action upon civilian complaints against members of the Police Department, unless such person, agency, board or group shall be duly appointed in accordance with the provisions of this section.

(E) Prosecution; Right to Hearing: Notwithstanding anything contained to the contrary, this section shall not be construed to prevent investigation, or prosecution of members o f the Folcie Department for violations of law by a duly constituted court having jurisdiction, a grand jury, district attorney, or other law enforcement agency; nor shall this section be construed to permit a member of the Police Department to be fined, reprimanded, removed, suspended or dismissed, except upon written charges, after such charges have been examined , heard, investigated by the Commissioner, one of his deputies, or the assistant to the Commissioner.

(F) Separability: The invalidity of any provision or provisions of this section shall not affact the validity of the remaining sections thereof, but such provisions shall continue in full force and effect.

Section 2. This local law shall take effect immediately.

Each of the undersigned petitioners for the local law set forth above states as follows:

I, the undersigned, do hereby state that I am a duly qualified elector of the City of New York, registered to vote in such city at the last general election, that my place of residence is truly stated opposite my signature hereto, and that the place of residence from which I was registered at the timeof the last general election, if different from my present address, is likewise truly stated opposite my signature. I declare that the foregoing statement made and subscribed by me, is true.

In Witness Whereof, I have hereunto set my hand the day and year placed opposite my signature.

Date	Full Signature	Residence	Election District	Assembly District	Residence as of Nov. 2, 1965

(Statement of witness at bottom of each page)

DRAFT

Advisory opinion of Scholarship, Education and Defense Fund for Racial Equality on behalf of Congress of Racial Equality to the City Clerk.

RE: The validity or invalidity of the proposed city charter amendment relating to civilian complaints against members of the Police Department.

Petitions have been filed in the Office of the Clerk of the City of New York pursuant to provisions of Section 37 of the Municipal Home Rule Law.* The petitions propose the enactment of a local law to amend the New York City charter to require that all members of any review board established to investigate and process civilian compalints against policemen be full-time members of the Police Department of the City of New York, thereby prohibiting establishment of a review board comprised in whole or in part of a civilian members. We recommend that such petitions fail to meet the requirements of Section 37 and represent an invalid attempt to use the power of referendum.

I. INITIATIVE ACTION IS AN EXTRAORDINARY MEASURE REQUIRING EXPRESS STATUTORY AUTHORIZATION

Representative democracy as embodied in the system of government established by the Constitution and laws of both the United States and the State of New York includes the idea that laws be enacted by a duly elected legislative assembly and that direct action by the electorate which may disrupt the orderly procedure of government be reserved for exceptional situations. (Lynch v. O'Leary, 178 Misc. 567, 2 N.Y. 2nd 588) Thus,

> "...direct legislation in cities must always rest on some constitutional or statutory grant of power. Government by representation is still the rule. Direct action by the people is the exception" (Matter of McCabe v. Voorhis, 243 N.Y. 413).

II. THE PROPOSED LOCAL LAW DOES NOT IN FACT CONSTITUTE A CHARTER AMENDMENT

Section 37 of the Municipal Home Rule Law of the State of New York provides for the adoption of city charter amendments initiated by petition. The essential requirement of this section, as repeatedly emphasized by New York courts, is that the proposed local law be in fact a charter amendment, as distinguished from other local laws, ordinances and resolutions which differ in form and content from charter provisions. (Astwood v. Cohen, 291 N.Y. 484). To determine whether requirements of section 37 have been met, the courts compare the proposed law with existing charter provisions with respect to scope and content. (Hacker v. Common Council of Ithaca, 266 N.Y.S. 2nd 925, 49 Misc. 269).

The New York City Charter has been characterized as a typical "short form" charter, i.e., "a mere skeleton of governmental structure" (Matter of Warden, 300 N.Y. 39), resembling a constitutional document. For example, section 434(a) of the city charter which is framed in extremely general terms and under which the police commissioner derives the authority to establish the Civilian Complaint Review Board states "the commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department and of the police force of the department." This contrasts sharply with the charters of other New York municipalities which define and delineate the details of permissible official action and administrative conduct. In such municipalities a proposed local law on procedures for handling civilian complaints against police might indeed be an appropriate amendment to the city charter (Matter of Warden, supra); however, it is entirely inappropriate as an amendment to the New York City Charter in view of its length, subject matter and specificity. Such a detailed provision would more likely be contained in the Administrative Code of New York City, "which was enacted by the legislature as a codification and restatement of existing law... supplemental to the New York City Charter" (Astwood v. Cohen, supra at 439)

Although drawn in the guise of a charter amendment, the proposed "local law" is, in fact, only appropriate as an amendment to the Administrative Code and not an amendment to the City Charter; for unlike the New York City Charter, which makes no mention of procedure for discipline within the police department, the Administrative Code devotes an entire, detailed section to this subject. (Section 434a -14.0, New York City Administrative Code). Moreover, part (b) of this section of the Code includes language identical to that of section 440(E) of the proposed local law. Yet, if the petitioners were to acknowledge that their proposal is an attempted amendment to the Administrative Code and not the City Charter, such attempt would be without legal authority, for there is no provision in New York law for the amendment of the Administrative Code by initiative action with regard to police matters.

III. ADMINISTRATIVE ACTS NOT SUBJECT TO LEGISLATIVE APPROVAL SHOULD NOT BE SUBJECTO TO INITIATIVE ACTION

Under the general provisions of section 434(a) of the City Charter (*supra*) the police commissioner was empowered to appoint a civilian complaint review board. On May ~~7~~ 17, 1966 he established by General Order No. 14, a review board comprised both of civilians and members of the police force. The validity of the commissioner's power to issue such an order has already been determined by the New York State Supreme Court (*Cassese* v. Lindsay, N.Y. Law Journal, Je ~~18~~ 24, 1966). The petitioners now seek to countermand this decision by means of a referendum.

A very similar situation developed in *Astwood* v. *Cohen* (supra) where the same sponsors as have presented the present petition, the Patrolmen's Benevolent Association, proposed a local law to amend the city charter by referendum, which law would have provided increased salaries for policemen and firemen. As mentioned above, the court declared that the proposed law, although pretending to be so was not in fact a proper charter amendment, but rather an administrative code amendment. In addition, however, the court explained that administrative decisions by public officials and agencies cannot be subjected routinely to public referendums. A decisive factor on this issue was whether the administrative act in controversy could be done without legislative approval:

> "Administrative action which may be taken without legislative authority or approval was not intended to be taken by direct action of the voters....The tradition of representative, democratic government is too strong to permit an inference that the legislature intended to extend the exceptional process of direct legislation to details of administration unrelated to amendments of the charter, whether regulated by local laws and ordinances or managed by responsible administrative agencies." (*Astwood* v. *Cohen*, *supra* at 491)

The police commissioner's General Order No. 14 was not subject to legislative approval and was issued without it. It follows, then, that a referendum on this matter would be inappropriate.

POINT IV
THE POWER TO INITIATE LEGISLATION SHOULD NOT EXTEND TO PURELY ADMINISTRATIVE MATTERS

Under the general provisions of Section 434a of the City Charter of New York, supra, and the more specific provisions of Section 434a-10.0 of the Administrative Code, supra, the police commissioner is empowered to appoint a civilian complaint review board. Pursuant to these provisions, the commissioner issued General Order No. 14 on May 2, 1966, amended on May 17, 1966, which established a complaint review board comprised both of civilians and members of the police force. The question of the validity of the commissioner's power to issue such an order has already been determined by the New York State Supreme Court. See *Cassese v. Lindsay*, New York Law Journal, June 24, 1966, page 12. There, the Court refused to enjoin the Police Commissioner from establishing the review board, ~~as he saw fit~~, upholding the power of the Police Commissioner to issue General Order No. 14. Justice Murphy in his opinion noted specifically the " ... right of the agency chief to control and administer his department .... It is not the province of any individual, or organization, or indeed, the Court, to dictate to an appointed public official how he may best command his department." (*Cassese v. Lindsay*, *Ibid.*)

In another recent New York decision involving referendum issues the Court warned that " a transparent attempt to formulate a ... referendum on some technical basis will not suffice, if in fact the attempt is really to avoid governmental responsibility and shift the burden of decision to a public poll." See [illegible] v. [illegible], supra, at 774. In other words, the Courts have expressed a strong reluctance to permit referenda to interfere with legally authorized administrative acts.

> It is quite generally held in this country that the power to initiate legislation under statutes providing for the initiative and referendum in the conduct of municipal affairs does not extend to such functions of city government as are ordinarily administrative in character. (People v. [illegible]) 355 Ill 596, 189 N.E. 920 (1934)

The tendency to protect administrative decisions from review by referendum and initiative action stems in part from a concern that ~~[illegible]~~ such devices ~~deliberately~~ many interfere with and delay the orderly performance of governmental functions by the proper authorities. ~~[illegible]~~

single space

"To allow laws dealing with referendum in the conduct of municipal affairs to be invoked to annul or delay executive or administrative action tends to delay and in some cases to annul the prompt and efficient administration of city affairs." Dahl v. Scottsbluff, 139 Neb. 418, 297 N.W. 669 (1941).

In other words, referenda and initiative were never intended as devices to inquire into and review acts reflecting the expertise and experience of administrative officials where such acts are necessary to the effective and continuing functioning of their departments. *Insert #9 In fact, the Court of Appeals, in ⟶

Astwood v. Cohen, *supra*, adopted precisely that test in ruling that administrative decisions by public officials and agencies cannot be routinely subjected to public referendum. The decisive issue was whether the administrative act in controversy could be performed without legislative approval;

> Administrative action which may be taken without legislative authority or approval was not intended to be taken by direct action of the voters .... The tradition of representative, democratic government is too strong to permit an inference that the legislature intended to extend the exceptional process of direct legislation to details of administration unrelated to a amendment of the Charter, whether regulated by local laws and ordinances or managed by responsible administrative agencies. *Matter of Astwood v. Cohen*, *supra* at 491.

The Police Commissioner's General Order No. 14 was not subject to legislative approval and was validly issued without it. This we know from the decision of the New York Supreme Court in *Cassese v. Lindsay*, *supra*.

The present proposal of the petitioners to bring the matter of a civilian complaint review board before the electorate clearly constitutes an attempt to interfere with and override the duly constituted power of the Police Commissioner to control the administration and discipline of the department. Therefore, initiative action on this matter is unlawful.

Insert #9

This was clearly the feeling of the New York City Charter Revision Commission when it considered the incorporation of a provision for initiative action into the City Charter itself:

Single Space

> "This initiative is broad enough to admit of the submission to the people of broad questions of principle in relation to the frame of the government such as may appropriately be submitted to popular vote; but it was not thought wise to permit initiation of questions of administrative detail that can more deliberately and effectively be dealt with by a legislative body."

Report of New York City Charter Revision Commission supra, at 41.

46-2000-50M-1029131(64) 114

filed in Clerk's Office Special Term I Room 119

NEW YORK COUNTY CLERK'S OFFICE

New York, August 3 1966

Clerk:

Please furnish the undersigned with the following papers:

When presenting this requisition at judgment docket and lien desk, please supply the following information.

If Your Paper Is Listed In Today's or Yesterday's Law Journal, Please Tell Clerk.

TITLE OF SUIT

In the Matter of the Application of

PLAINTIFF

MARIA E. MONPLAISIR

Michael J. Yorke and Lois Chaurzel

DEFENDANT

HERMAN KATZ,

NATURE OF PAPER

order ~~motion~~ to show cause & petition

DATE FILED

7/28/66

COURT OF ISSUE

File No. 12121 Year 1966

PAPERS REQUIRED FOR

Please Check

Examination or to conform	✓
Supreme Court Section	
Enter Judgment	
Certified Copy Desk	
Special Term, Part........	
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A separate requisition must be submitted for each file requested.

CO7-6270

pl. atty J.J. Leff 36 W. 44 St.

Order spec. II - Show Cause 8/9/66

Aug 2. Donald Duff must be rescued

—PBA—

FOR RELEASE FRIDAY, AUGUST 5, 1966, 11:00 A.M.

CONSERVATIVE AND P.B.A. PETITIONS FOUND INSUFFICIENT BY CITY CLERK HERMAN KATZ

The petitions filed by the Conservative Party and by the Police Benevolent Association with the City Clerk last month, proposing Charter Amendments mandating police disciplinary trials by police officials only was today found insufficient.

In his certificates to the City Council, required by Section 37 of the Municipal Home Rule Law, Mr. Katz stated that he found the Conservative Party petition insufficient in law and in signatures and the P.B.A. petition insufficient in law.

Annexed are copies of the City Clerk's certificates to the City Council.

Research Problems on the
Civilian Review Board Advisory Opinion

1. Copy of the court record in Cassese v. Lindsay obtained from Norman Redlich of the Corporation Counsel's office.

✓2. The history of the referendum

✓3. Cases:
Report of the Charter Revision Committee of 1936 on the New York City Charter (old volume)

✓Coyne v. Renny, 32 P. 578, 97 Cal. 590 (1893)
✓Zane Carter v. Fort Worth, 269 SW 130 (1925)
✓People v. Kapp, 189 NE 920 (1934) 355 Ill. 596
✓McElRoy v. Hartsfield, ~~XXX~~ 194 SE 737 (1937)
✓Murphy v. GILMAN, 204 ~~NE~~ ~~[illegible]~~ IOWA 58, 214 N.W. 679 (1927)
✓Swanker v. City of Amsterdam, 161 NYS2d 932, 5Misc2ed 932 (1957)
✓Application of Sposato, 180 Misc. 933, 43 NYS2d 426 (1943)
✓Mills v. Sweeney, 219 NY 213, 114 NE 65 (1916)
, 102 Cal. 113
, ~~120 ALR2d 914~~ (inapplicable)
, ~~100 NYS2d 932~~

✓READ v. City of Scottsbluff, 297 NW 669, 139 Neb. 418 (1941

People v. Kapp, on admin acts not subject to referendum, cites:
170 Cal. 605, 150 P. 977
108 Neb. 573, 188 NW 237
242 Mass 599, 136 NE 616
53 Ore 92, 98 P 149, 1111
26 Okl. 826, 110 P. 1052
305 Mo. 431, 266 SW 127
163 Minn. 100, 203 NW 514
155 Wis 632, 145 NW 239
114 Tex. 484, 271 SW 1106

an order of the A.D of Sup Ct. of
1st Jud Dept. (266 AD 957, 44 NYS2 315)
which aff'd by a divided ct an order of the
court at Special Term, Shientag J. granting a
motion by petitioner for an order under Art 78
of CPA directing Bd of Elections

CASE LIST

✓ MATTER OF Astwood v. Cohen, 291 N.Y. 484 (1944) APP. DIV.

✓ Cassese v. Lindsay, N.Y. Law Journal, June 24, 1966

✓ Burke v. Kern, 287 N.Y. 203

✓ Lynch v. O'Leary, ~~[illegible]~~ 166 Misc. 567, 2 NYS2nd 588

✓ Maylender v. Morrison, 260 A.D. 892, AFF'D 284 N.Y. 575 (1940)

✓ MATTER OF McCabe v. Voorhis, 243 N.Y. 401 (1926)

✓ Hacker v. Common Council of Ithaca, 49 Misc.2d 69, 266 NYS2d 925(1966)

✓ Matter of Warden, 300 N.Y. 39 (1949), 88 N.E. 2d 360

✓ We[illegible]lty v. Heafy, 108 N.Y.S2d 578, 200 Misc. 1010(1951)

✓ Kupferman v. Katz, 243 NYS2d 773 (1963)

✓ Noonan v. O'Leary, 132 NYS2d 726 (1954), 206 Misc. 175, AFF'D 133 N.Y.S 2d 217, 13 NY 2d 932.

✓ REUSS v. KATZ, (1964) 43 MISC. 2d 921, 252 N.Y.S. 2d 546, AFF'D 21 A.D. 2d 968, 252 N.Y.S. 2d 871

✓ STEINBERG v. MEISSER (1943) 181 MISC. 433, 44 NYS 2d 752

✓ HARDWICK v. KRAMER (1951) 200 MISC. 707, 107 NYS 2d 65, 278 A.D. 1040, AFF'D 303 N.Y. 605, 101 NE 2d 186.

1. Consolidate briefs into one
2. Table of cases
✓3. City clerk's authority to make judgments on substantive questions
✓4. motion papers for leave to appear as amici in appellate division.
5. Show legislative intent behind 1944 amendments (see #14)
✓6. Warden quote saying Astwood is specifically distinguished
7. Draft argument based on failure to specify the chapter number, year of enactment, sections, subsections, and other parts of each statute or local law affected according to section 37 MHRL
8. Statement of Issues:
   a) are the proposed local laws in fact charter amendments?
   b) are the administrative functions to be limited by such proposed laws open to review by initiative action?
   ~~x)xare~~
   c) were laws of the type now proposed intended to be brought under section 37 of MHRL?
   d) were the local laws and statutes to be affected by such proposed laws specified in the petitions?

9. Stress argument that charter is separate from the code because matters of administration were to be protected from interference by the public; in New York City it would be very easy for 30,000 to push through administrative changes and disrupt department functioning.
   The public should be able to use the referendum as a means of establishing the principles under which the government shall function, but should not be able to determine the detailed procedures which would be used to effect those principles. Otherwise nothing would get done.
   (See City's brief on "Historical Development of Charter and Code"

10. Expand argument that they are really amending the Admin. Code and General Order No. 14. See City's brief on "Distinction between Code and Charter clearly shown in Police provisions" They admit amending Admin Code when they use same language. Show how it changes Code
11. Any law showing that intent was to make Admin. Code provisions immune from referenda and initiative.

12. Astwood quote that no power is changed; then compare by showing that Commissioner still has control and cognizance of his dept. See City brief, page 22.

✓13. Definitions of "referendum" and initiative i n Black's
14. Stress difference between unrelated and related amendments, both of which now can be added; and the difference bewteen amending "however extensively and the difference
   a. alien or unrelated thereto doesn'tmmatter
   b. "however extensively" means adding so many provisions that a new charter would be instituted; but does not mean "however detailed" or "on any administrative matter
   c. Heading of this section should say: That the charter may be amended "however extensively" does not mean that any detail or administrative restriction may be added; or THE EXPRESS PROVISION THAT THE CHARTER MAY BE AMENDED "HOWEVER EXTENSIVELY" WAS NOT INTENDED TO PERMIT CHARTER AMENDMENTS OF THIS KIND

15. History of initiative in New York (See City brief, p. 25 ff)
16. Incorporate appendix into text

August 9, 1966

Re: PBA & CP Police Review Board, Etc., Charter Amendment Petitions.

1. The NY Co. Supreme Court proceeding, of Cassessesy. Katz, is an utterly frivolous proceeding. It has no warrant under Sec. 37, Municipal Home Rule Law, and has no factual basis as an Article 78, CPLR or a Declaratory Judgment proceeding. Motion to dismiss this proceeding ought to be made.

The Sec. 37 MHRL proceeding, allowing a person to enter objection by Petition, to a proposed Charter amending local law commenced by popular petition, only applies to persons who contest the validity of the charter amending proposal, and does not accord any right in a person who objects to the City Clerk's opinion about the Petition for a Charter Amendment. The City Clerk's opinion, as to whether he approves or disapproves the Petition, is merely an advisory opinion to the Council, which is plenarily empowered to adopt the charter amendment proposed en toto as its own bill. Thus, PBA cannot possibly be aggrieved by any ruling of Katz. wrong – Katz certifies invalidity + Council doesn't adopt – then no referendum

wrong §37 allows Stay of proceedings over Clerk's decision

Whether PBA has brought this suit in be re ignorance of what they are doing, or in an attempt to mislead other people into thinking a judgment by the Supreme Court would preclude other objections to the Petition, or merely to try to create a supposed res judicate claim respecting matters litigated concerning the bill in Cassesse v. Katz, I cannot say. But it is plain this whole proceeding is legally a nonsense.

2. I do not see the slightest merit in Katz's claim that if the bill involved a detail of governmental action, and did not involve matters of general grants of power, etc., that it could not be made the subject of a Charter amending local law.

(a) The holding of HACKER V. COMMON COUNSIL, 49 MISC 2d 927, at p. 930 through 932, (Supreme Court) is unassailable. The rule laid down in ASTWOOD V. COHEN, 291 N. Y. 484 (1943) was abrogated by the 1944 amendment of the City Home Rule Law. Charters, (to wit, the ~~laws~~ basic of the municipal corporation) can have in them whatever the governing boards of the municipal corporation choose to put in them. The "library" or "editing" detail, of whether they should be "short form" or "long form" is not a matter of fundamental human or property rights, and not the kind of thing that constitutes a matter of "public policy."

(b) Even before ASTWOOD V. COHEN, it was plain that a municipal corporation could put what it chose into its charter, As Judge Van Voorhis, (now on the Court of Appeals,) noted in 1938, in MATTER OF LYNCH V. O'LEARY, 166 MISC 567, 577:

"When the City Home Rule Law was passed by the legislature, it expressly preserve to the local governing bodies of cities the same power they had to enact ordinances. . (including by ordinance the power to amend their own city charters provided matters included did not conflict with any State statute.) (But) it did more than this, however, (in enacting the City Home Rule Law.) It provided that ' the local legislative body shallshall have power to adopt and amend local laws in relation to the property, affairs and government of a city (Sec. 11) which are given the force of State law superseding conflicting

special or local acts of the legislature (Sec. 12)."
Since the promulgation by the Legislature of the Charter and Administrativ e Code of the City of New York was done by "special and local acts of the legislature", it is clear that there is plenary power in the local City government the change the format of its codification of laws as supposedly prescribed by the State Legislature, as is claimed in ASTWOOD V. COHEN.

Wrong
interp of
1944
ch
amendmt

As shown in HACKER V. COMMON COUNCIL, Supra, the Municipal Home Rule Law particular defines a Charter amendment as any change in the Charter "of any extent". If I add anything to the Charter I change it. And so this PBA proposal to add Sec. 440 to the Charter is a change in the Charter "of any extent". (The provision of Sec. 2 of the Municipal Home Rule Law that defines a "local law" as a matter that does not include an "ordinance" or "resolution", has no applicability to the issue of the scoep or extent of subject matter. What it has reference to is whether the enactment is to have :the force of State law", or the force of the bare municipal corporation. This is a distinguishment whose value is a matter of special legal meaning, primarily related to the issue of whether law of the lcoal agency have a "corporate" or "governmental" character, and is a technical consideration no longer relevant locally, in amatter of this kind.

Put simply, virtually any sort of matter which, if enacted ~~would be~~ in a valid mannner of some kind, would be a valid ~~law~~ local law, can be placed into the New York City Charter by the popular initiat ive method, just as the City Council right now possess the power to put into the City Charter anything which it may validly put into the Administrative Code. The City of New YOrk has the power plainly to plenarily decide how it is to codify its own laws, and the Court of Appeals, in ASTWOOD V. COHEN was way off base when it claimed that an intendment as to a system of codifcation declared impliedly by the State Legislature bars the City from putting details into its Charter, such as many other municipal corporation throughout the State freely do. (See e.g. WARDEN V. NEWBURGH, 300 N. Y. 39.)

There is no valid objection to the PBA's on the ground it solely contains matter such as ordinarily placed in the Administrative, even if it were true the bill only alleges the detail of what the status shall be of person who are members of the police review board.

3. The PBA Petitions are void on their face, and in such a way as to be of gross defect misleading the persons who signed them. As I have noted before, this proposal by PBA does not only pertain to composition of a departmental police disciplinary review board. It also goes to curtail the powers of the Mayor, the C ty Council, the Controller, The Commissioner of I vestigation, the Commission on Human Rights, the Borough President, the Board of Estimate and others, by imparing their present powers to investigate or investigate under subpoena persons employed in the Police Department, upon complaint from the public.

Sec. 37(4) Muni. Home Rule Law mandatorily provides that if "such a (charter amending) local law . . . amends, repeals or supersedes any local law. . . it shall specify the chapter number and year of enactment, sections, subsection and other parts of each statute or local law affected. . . "

The PBA bill does not specify the various sections of the Charter and Administrative Code that, as I have noted, it will amend by curtailing the powers of the various other city agencies to investigate, etc. re. police department personnel.

~~xx~~ The Municipal Home Rule clearly shows that this kind of defect in the language of the proposed local charter mending law renders the bill invalid. The provision that such amendatory and repealing provision must be incorporated in the proposed bill is so that petition signers may be fairly advised of the thrust and nature of the proposed charter amending local law. The defect, of failing to specify how this PBA will cut at the powers of the Mayor, Investigations Commissioner, etc., grossly misled the signers of the Petition. They were not given due specificiation. In the Municipal Home Rule Law other provisions relate to this subject of giving specification of repealers to be effected by local laws, and in the MHRL as to these parts, it is specially provided that the failure to state the repealers in the face of the proposed charter amending or other local laws, in the manners specified, shall not be deemed to invalidate the proceeding. For example:

> (1) At Sec. 37(3), MHRL, where it specifies there is a requirement to set forth "either in brackets or with lines through it matter (in existing law) to be repealed or superseded" it is provided that "failure so to set forther any provision of the charter (in brackets or with lines through it) which is in fact superseded shall not invalidate the amendment or new charter or any portion thereof."
>
> (2) And at Sec. 22, Muni. Home Rule Law, it is provided that in respect to legislation enacted by the City Council that the Council "shall specify the chapter or local law or odinance, number and year of enactment, section, subsection, or subdivision, which it is intended to change or supersede, but failure to so specify shall not affect the validity of such local law."

It is well-settled that when statutes mandate that law must be enacted in certain forms, for the purpose of providing those called upon to enact them with fair notice of the thrust and nature of the law proposed upon existing law, then such defect renders the proposed law invalid. This is a denial of a statutory right of "due notice", in the nature of a fundamental constitutional right under the Due Process clause.

On this ground the PBA petitons can be utterly invalidated. In the event due suit is not shortly brought on this point, I shall see that such is done.

JOHN M. LAWRENCE
57 W. 10ST.
NYC 11, N.Y.

MONPLAISIR v. KATZ
Petitioner's Memorandum

I. Jurisdiction of the Court - MHRL S.37,24; EL S.335

II. Clerk's certification erroneous as to signatures and law.

Clerk failed to examine petitions properly. Should use standard established in Potash v. Molik, 35 Misc 2d 1, 230 NYS2d 544, aff'd 17 AD2d 111, 232 NYS2d 993. Not all the provisions of the election law are applicable to special proceedings under S37 and 24, since they say election law rules govern only "where applicable". Fact that not using printed books to check signatures would make clerk's job harder is irrelevent.

III. Proposed law amends charter only.

Bakground cites : Constitution, Art. 9, S.2; MHRL, S.10. Language of petition is clear, unambiguous. Administrative Code is unaffected by proposed law - it doesn't change any disciplinary proceedings, just limits who can hear. Lindsay case shows this is proper topic for charter amendment by saying commissioner got power to issue order 14 from charter.

IV. Relief asked - nullify city clerk's certification, order petition re-examined and have legall sufficiency question decided later, when second set of petitions must be filed.

Cassese
cont

SUMMARY OF DETERMINATIONS BY THE POLICE REVIEW BOARD
OF PHILADELPHIA PENNSYLVANIA

(Source: Annual Reports for 1963and 1965
of the Philadelphia Police Review Board)*

1. In the seven years of existence of the POLICE ADVISORY BOARD OF THE CITY OF PHILADEBPHIA, PENNSYLVANIA, from October, 1958 through December, 1965 there were filed

    704 complaints of various kinds, classified by that board as brutality, illegal arrest or search, harrassment, or miscellaneous or other complaints of miscoduct.

    Of these 704 complaints, there were solely

    87 decisions made in any aspect favorable to the complaining citizens, or a 12% or 1-out-of-8 chance for success for the complainants in any form

    Discipline action was confined solely to

    23 reprimands and in only

    15 cases were suspensions or any other form of direct disciplinary action taken, or a disciplinary action rate of only 2%, or in 1-out-of-50 cases.

2, In the business year (for the Board) of 1963 -- from Sept. 1962 to Sept. 1963, there were filed

    99 complaints in the above mentioned categories

    34 of these cases alleged brutality

    Only a total of 27 out of the 99 cases filed were finally processed by the Board in the year

    1 reprimand, and no direct disciplinary action was taken against any police officer, for a 1 % chance for finding against the officer involving either admonition or punishment.

    Only 3 cases of the 27 cases processed out of the 99 cases filed, resulted in any favorable ending for the complainant, with 1 apopogy being given and records of arrest of those who complained being expunged from police files.

Thus, in 1963, the complainant's chance of any modicum of success dropped to 4% or a 1-out-of-25 chance.

Brutality cases amounted to 34% of the case load in 1963.

3. In the board year of 1964, there were 127 complaints filed, and of these

48 were brutality cases,

The brutality rate of case then rose to 38% of the case load in 1964.

4. In the board year of 1965, there were 131 complaints filed, and of these

73 were brutality case,

The brutality rate thus rose to 55% of the complaints case load in 1965

Of these 73 brutality complaints, only 1 was finally processed in the year 1965.

Of the total of 131 complaints, only 9 were decided in favor of complainants

A total of 10 were closed upon bases such as the complainant died, the complainant did not show up at any hearing, or the complainant withdrew the complaint. No admonitions or any punishment of officer was recorded.

Thus, the complainant's chance rose to 7% or 1-out-of-19 to win, while the officers' jeopardy rate went to 0%.

Where only 19 out of 131 cases filed in the year were concluded in that year, the period of delay in action exceeds an average of six months.

During 1965 the board said it "closed" a total of 88 cases, and 69 of these were from the preceeding year, and of this total of 88 it closed, 57 of these were said to be cases where the complainant did not pursue the matter, on such claims as "complaint withdrawn", compainant did not "appear at hearing", and complainant did not "respond" to a "lo day letter" notice of hearing, or "Could not locate complainant".

This is a default ratio of 7-out-of-11, or 65% on prosecution of cases, says the board.

1 reprimand and 1 dismissal of an officer resulted from the processing of these 88 cases, for a jeopardy factor of 2% for the officers.

It is said that 6 cases were "settled", and in 8 other cases records made by the police of complainants were directed expunged,

Thus, the complainant's ratio of succes was 16 out of 88, or 18%. 2 complainants were committed to a state mental hospital, and one other finally received a 20 year prison sentence.on a criinal charge.

MSS SEDFRE
546

Castle, Doris et al vs Davis, Jimmie H et al Feb., 1964

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FEB 13 1964

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CORE
General Counsel
Carl Rachlin

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

DORIS CASTLE,	COMPLAINT
REV. AVERY C. ALEXANDER, AND	CIVIL ACTION
SANDRA NIXON, ET AL	NUMBER

VS.

JIMMIE H. DAVIS, et als
AS GOVERNOR OF THE STATE OF LOUISIANA,
JACK P.F. GREMILLION,
AS ATTORNEY GENERAL OF THE STATE OF LOUISIANA,
VICTOR H. SCHIRO,
AS MAYOR OF THE CITY OF NEW ORLEANS,
JAMES E. FITZMORRIS AND JOSEPH V. DIROSA,
AS COUNCILMEN-AT-LARGE
OF THE CITY OF NEW ORLEANS,
HENRY B. CURTIS,
WALTER F. MARCUS,
LARENCE O. DUPUY,
OHN J. PETRE, AND
ANIEL L. KELLY,
S COUNCILMEN OF THE CITY OF NEW ORLEANS,
IM GARRISON,
S DISTRICT ATTORNEY FOR THE CITY OF NEW ORLEANS,
OSEPH I. GIARRUSSO,
S SUPERINTENDENT OF POLICE, CITY OF NEW ORLEANS, AND
.S. RUTLEDGE,
S DIRECTOR OF PROPERTY MANAGEMENT OF THE CITY OF NEW ORLEANS,
OBERT H. LENDERMAN,
S REGISTERED AGENT FOR JOHNN-LYNNS CAFETERIA INC.

PLAINTIFFS:

PLAINTIFFS DORIS CASTLE, REV. AVERY C. ALEXANDER AND SANDRA NIXON ARE ALL NEGROES, OF AGE, AND CITIZENS OF THE STATE OF LOUISIANA.

DEFENDANTS:

JIMMIE H. DAVIS, IS THE GOVERNOR OF THE STATE OF LOUISIANA.

JACK P.F. GREMILLION, IS THE ATTORNEY GENERAL OF THE STATE OF LOUISIANA

VICTOR H. SCHIRO, IS THE MAYOR OF THE CITY OF NEW ORLEANS.

JAMES E. FITZMORRIS AND JOSEPH V. DIROSA, ARE BOTH COUNCILMEN-AT-LARGE FOR THE CITY OF NEW ORLEANS.

HENRY B. CURTIS, WALTER F. MARCUS, CLARENCE O. DUPUY, JOHN J. PETRE AND DANIEL L. KELLY ARE ALL COUNCILMEN FOR THE CITY OF NEW ORLEANS.

JIM GARRISON IS DISTRICT ATTORNEY FOR THE CITY OF NEW ORLEANS.

JOSEPH I. GIARRUSSO, IS THE SUPERINTENDENT OF POLICE FOR THE CITY OF NEW ORLEANS.

F.S. RUTLEDGE, IS THE DIRECTOR OF THE DEPARTMENT OF PROPERTY MANANGEMENT FOR THE CITY OF NEW ORLEANS.

ROBERT H. LENDERMAN IS THE REGISTERED AGENT FOR SERVICE FOR JOHNN-LYNN'S CAFETERIA, INC.

A LOUISIANA CORPORATION ORGANIZED TO DO AND DOING BUSINESS IN THE CITY OF NEW ORLEANS, LOUISIANA.

A.) ALL OF THE DEFENDANTS ARE ADULTS, MALE, CAUCASIAN AND THEY AND THEIR SUCCESSORS IN OFFICE ARE CITED AS DEFENDANTS IN THEIR OFFICIAL CAPACITY.

JURISDICTION

JURISDICTION IS BASED ON:

1. Section I of the Fourteenth Amendment.
2. 28 U.S.C. 1331
3. 28 U.S.C. 1343 (3)
4. 28 U.S.C. 2201
5. 28 U.S.C. 2202
6. 28 U.S.C. 2281
7. 28 U.S.C. 2284
8. 42 U.S.C. 1981
9. 42 U.S.C. 1983
10. RULE 23 (A) (3) FEDERAL RULES OF CIVIL PROCEDURE.
11. RULE 65 (B) FEDERAL RULES OF CIVIL PROCEDURE.

SUMMARY OF SECTIONS RELIED ON FOR JURISDICTION:

1. Section I Fourteenth Amendment Provides:

   "...No State shall...Deny to any person within its Jurisdiction the equal protection of the Laws."

2. 28 U.S.C. 1331 Provides:

   Original Jurisdiction in Civil Actions in controversies over $10,000.00.

3. 28 U.S.C. 1343 (3) Provides:

   Original Jurisdiction in Civil Actions For State deprivation of Rights, Privileges or immunities granted by U. S. Constitution or U. S. Laws.

4. 28 U.S.C. 2201 Provides:

   For Declaratory Judgments.

5. 28 U.S.C. 2202 Provides:

   For Further Relief Based on Declaratory Judgments.

6. 28 U.S.C. 2281 Provides:

   Against Interlocutory or permanent injunctions based on the Unconstitutionality of State Statutes except by a three Judge Court.

7. 28 U.S.C. 2284 Provides:

   Convening of Three Judge Court.

8. 42 U.S.C. 1981 Provides:

   Federal Statutory Guarantee to Equal Protection of the Laws.

9. 42 U.S.C. 1983 Provides:

   Actions against persons who under color of Law subject citizens to deprivations of Rights, Privileges or Immunities granted by U. S. Constitution or Laws.

NATURE OF CAUSE OF ACTION

This is a Class Action Praying For:

1.) Convening of a Three Judge District Court

2.) Issuance of A Temporary Restraining Order, Preliminary and Final Injunctions against all Defendants enjoining them from Unconstitutionally preventing Negroes from use of the cafeteria facilities located in the city Hall Building.

3.) Issuance of a Declaratory Judgment declaring that The Arrest of any Negro and/or White person accompanying a Negro and charge, either city or State, and Prosecution and Conviction for attempted peaceful use of the City Hall Cafeteria is unconstitutional and void being in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Further it is requested that the Declaratory Judgment State that under the terms of the agreement between the city of New Orleans and Mr. Robert H. Lenderman The President of John-Lynn's cafeteria the City must comply with the proscriptions of the Fourteenth Amendment as fully as though they were binding covenants written into the agreement itself.

4.) Plaintiffs and all other Negro citizens of the United States are threatened with irreparable injury by reason of the conditions herein complained of. They have no plain adequate or complete remedy to redress these wrongs other than by this suit. Any other remedy would be attended by such uncertainties and delays as to deny substantive relief and would involve a multiplicity of suits and cause further irreparable injury, damage and inconvenience to plaintiffs and all other Negro citizens of the United States.

FACTUAL SITUATION

On October 31, 1963, at about 11:50 a.m., Doris Castle, Rev. Avery C. Alexander and Sandra Nixon along with four other persons went to the basement of the City Hall Building in New Orleans and entered the Johnn Lynn Cafeteria and sought to purchase some food.

As soon as the cafeteria personnel realized that Negroes were attempting to be served, a lady who is thought to be the assistant manager appeared and informed the group that they "Don't serve colored peopl In the meantime she blocked the entrance to the food line. Someone of the Negroes retorted that "We come to be served because this facility is located in a tax supported building." To this the lady replied, "That does not matter, this firm leased the cafeteria rights from the city and this gives them the right to serve whomever they please."

Apparently someone in the meantime had called the police and the manager because both appeared almost simultaneously. The manager then repeated the refusal to serve based on race just as the assistant manager had said. The manager then asked the Negroes to leave. They refused and then the manager called over the police who had been standing nearby and requested that they be arrested because they had trespassed on his property.

The police then asked the Negroes to leave and gave them five minutes to do so. No one left, additional Doris Castle and Sandra Nixon remained seated and Rev. Avery C. Alexander sat down at the head of the food line. Rev. Alexander said, "I'm not going. I won't move." In reply the police said this is going to be rough and instead of seizing Rev. Alexander by both arms, seized him by both ankles and dragged him up two flights of stairs, through the City Hall corridor, down the long entrance steps to the patrol wagon at the side walk; his back and head being bumped, scraped and bit as he went along at a fairly rapid pace. Meanwhile both Miss Castle and Miss Nixon were taken chair and all out to the patrol car.

Subsequently, Doris Castle, Rev. Avery C. Alexander and Sandra Nixon were charged in the First Municipal Court in affidavit No. J-17478-63 with violation of a city ordinance, 828M.C.S.49-2 Resisting Arrest, a copy of the affidavit is attached hereto and made a part hereof as if copied in extenso.

Additionally Doris Castle, Rev. Avery C. Alexander and Sandra Nixon have been charged in informations numbered 183-277 and 183-278 with violations of L.S.A.-R.S. 14:59(6) and 14:108 Criminal Mischief and Resisting an Officer, state offenses. As of today, January 28, 1964, no informations had been filed by the District Attorney's Office.

As a result of being dragged by the police, Rev. Avery C. Alexander has sustained certain body injuries for which he is still being treated

CLAIM

THE CIRCUMSTANCES SURROUNDING THE OCCUPANCY BY THE JOHNN-LYNN CAFETERIA OF SPACE IN CITY HALL;

THE REFUSAL OF ROBERT H. LENDERMAN, THE MANAGER OF THE JOHNN-LYNN CAFETERIA TO SERVE PETITIONERS SOLELY BECAUSE THEY WERE NEGROES;

THE PARTICIPATION OF THE POLICE AND THE DISTRICT ATTORNEYS OFFICE IN THE ARREST AND CHARGING OF PETITIONERS WITH CRIMINAL OFFENSES

MANIFEST TO A SIGNIFICANT EXTENT THE STATES INVOLVEMENT IN PRIVATE DISCRIMINATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

CLAIM II

UNDER THE CIRCUMSTANCES OF THE OCCUPANCY BY THE JOHNN-LYNN CAFETERIA OF THE SPACE IN CITY HALL, THE CITY OF NEW ORLEANS MUST ABIDE BY THE PROSCRIPTIONS OF THE FOURTEENTH AMENDMENT AS CERTAINLY AS IF THEY WERE BINDING COVENANTS IN THE OCCUPANCY AGREEMENT.

PRAYER FOR RELIEF

WHEREFORE, PETITIONERS PRAY THAT:

1.) The Court convene a three judge court as provided by Title 28 United States Code, Section 2284.

2.) A temporary restraining order issue without notice enjoining defendants from enforcing a policy on segregation against Negroes based solely of race by invoking the aid of the criminal processes of the city and state governments.

3.) The Court advance this complaint on the docket and order a speedy hearing thereof according to law and that upon such hearing the court enter a temporary injunction enjoining defendants from enforcing a policy of segregation against Negroes based solely on race by invoking the aid of the criminal proccesses of the city and state governments.

4.) The court upon a final hearing of this cause enter a permanent injunction, enjoining defendants from enforcing a policy of segregation against negroes based solely on race by invoking the aid of the criminal proccesses of the city and state governments.

5.) The Court upon final hearing of this cause declare the rights of the parties; namely, that in leasing, rental or occupancy agreements between a state of agencies of a state involving public property for the purpose shown herein the state has a duty to abide by the proscriptions of the fourteenth amendment to the United States Constitution.

6.) The Court allow petitioners their costs and attorney fees and such other and further relief as may appear just and proper in the premises.

OF COUNSEL:

ERNEST N. MORIAL
1821 ORLEANS AVENUE

REVIUS O. ORTIQUE
2140 ST. BERNARD AVENUE

AUGUSTINE & SMITH
1470 N. CLAIBORNE AVENUE

FREDDIE WARREN
1333 CAFFIN AVENUE

LAWRENCE WHEELER
8820 HICKORY STREET

ATTORNEYS FOR PETITIONERS

ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE
2211 DRYADES STREET

ALVIN JONES
503½ S. RAMPART STREET

BY:______________________________

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

DORIS JEAN CASTLE

who being duly sworn did depose and say that she is one of the petitioners in the above and foregoing complaint, that she has read the same and all of the allegations of fact contained therein are true and correct.

____
DORIS J. CASTLE

SWORN TO AND SUBSCRIBED
BEFORE ME THIS_____ DAY
OF JANUARY, 1964.

____
NOTARY PUBLIC

PLEASE SERVE:

HON. JIMMY H. DAVIS, BATON ROUGE, LOUISIANA

HON. JACK P.F. GREMILLION, SUPREME COURT BUILDING, NEW ORLEANS, LA.

HON. VICTOR H. SCHIRO, CITY HALL, NEW ORLEANS, LOUISIANA

HON. JAMES E. FITZMORRIS, JOSEPH V. DIROSA, HENRY B. CURTIS, WALTER F. MARCUS, CLARENCE O. DUPUY, JOHN J. PETRE AND DANIEL L, KELLY AT CITY HALL, NEW ORLEANS, LOUISIANA

HON. JIM GARRISON AT CRIMINAL COURTS BUILDING, TULANE & BROAD STREETS

JOSEPH I. GIARRUSSO AT CRIMINAL COURTS BUILDING, TULANE & BROAD STREETS

F.S. RUTLEDGE, DEPARTMENT OF PROPERTY MANAGEMENT CITY HALL, NEW ORLEANS

JOHNN-LYNN CAFETERIA, INC. CITY HALL BASEMENT, CIVIC CENTER THRU
ROBERT H. LENDERMAN, PRESIDENT

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority personally came and appeared:

DORIS CASTLE

who after first being duly sworn did depose and say that on October 31 1963 at about 11:50 a.m. she, Rev. Avery C. Alexander, Sandra Nixon and four other persons entered the Johnn-Lynn Cafeteria in the City Hall Basement and attempted to purchase some food.

The female cashier approached the Negroes and told them she couldn't serve them. When asked why, she repeated she just couldn't serve them. At this point the cashier told the other employees not to serve them. After waiting about twenty-five minutes, Rev. Alexander, Sandra Nixon and I decided to sit at the tables which left the other people standing. At this point the manager came in, I later learned his name was Robert H. Lenderman, and he told us that he had a right to refuse to serve us. Captain Cutrera then came to me and said that the manager had asked us to leave and he was now asking me to leave and that I had five minutes to make up my mind. At the end of the five minute period he again asked me to leave and I verbally refused to do so. My negative replies were recorded on what I believe to be a portable tape or wire recorder. Captain Cutrera then told me I was under arrest, and two police officers were called to execute the arrest. When I refused to leave under my own power, I was carried out to the patrol car in the chair in which I was sitting.

Subsequently, I was charged in the First Municipal Court in affidavit No. J-17478-63 with violation of a city ordinance, 828M.C.S.49-2 Resisting arrest.

I have also been charged in the State Court under informations numbered 183-277 and 183-278 with violations of L.S.A.-R.S.14:59(6) and 14:108, Criminal Mischief and Resisting an Officer.

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 29TH DAY
OF JANUARY, 1964.

DORIS CASTLE

NOTARY PUBLIC

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

DORIS CASTLE ET AL, PLAINTIFFS	CIVIL ACTION
VS.	NUMBER
JIMMIE H. DAVIS ET AL, DEFENDANTS	TEMPORARY RESTRAINING ORDER

TO THE HONORABLE THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA, BATON ROUGE, (LOUISIANA) DIVISION

WHEREAS in the above named cause it has been made to appear by the verified complaint filed herein which was on the_______day of _______ 1964, presented to the honorable ________________________, Judge of the United States District Court for the Eastern District of Louisiana that a restraining order preliminary to hearing upon motion for a preliminary injunction should issue, without notice, because immediate and irreparable injury, loss or damage will result to the plaintiffs before notice can be served and a hearing had thereon in that the unlawful acts of the defendants in using the coercive powers of the city and state criminal processes to implement the discriminatory policies of the Johnn-Lynn Cafeteria located in the City Hall of New Orleans are violative of the equal protection clause of the fourteenth amendment to the United States Constitution and the United States laws enacted pursuant thereto.

Notice and hearing before entering a temporary restraining order should not be required because the plaintiffs do not have any remedy at law, no injury can be caused defendants by such order, and the discriminatory policy of the cafeteria, the city of New Orleans and the State of Louisiana is palpably in violation of the laws of the land

Now, therefore, on motion of the plaintiffs:

It is ordered that the defendants, Hon. Jimmie H. Davis, Hon. Jack P.F. Gremillion, Hon. Victor H. Schiro, Hon. James E. Fitzmorris, Hon. Joseph V. Dirosa, Hon. Henry B. Curtis, Hon. Walter F. Marcus, Hon. Clarence O. Dupuy, Hon. John J. Petre, Hon. Daniel L. Kelly, Hon. Jim Garrison, Hon. Joseph I. Giarrusso, F.S. Rutledge and Johnn-

Lynn Cafeteria, Inc. and each of them, and their officers, agents, servants, employees, and attorneys, and those in active concert or participation with them who receive actual notice of this order by personal service, or otherwise, be and they are hereby enjoined from enforcing a policy of segregation of the races in the eating facilities located in the basement of the City Hall Building in the city of New Orleans, operating under the name of the Johnn-Lynn Cafeteria, Inc.

This restraining order issued at________o'clock________m., this __________ day of ______________________, 1964.

UNITED STATES JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

DORIS CASTLE, ET AL. PLAINTIFFS	CIVIL ACTION
VS.	NUMBER
JIMMIE H. DAVIS, ET AL. DEFENDANTS	MOTION FOR PRELIMINARY INJUNCTION

TO THE HONORABLE, THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION.

COMES, now, through undersigned counsel, Doris Castle et al, plaintiffs herein and respectfully move this Honorable Court for the issuance of a preliminary injunction preliminarily enjoining the defendants their officers, agents, servants, employees and attorneys and those persons in active concert or participation with them, who receive actual notice of such preliminary injunction by personal service or otherwise from enforcing a policy of segregation of the races based solely on race in the eating facilities located in the basement of the City Hall Building in the city of New Orleans operating under the name of the Johnn-Lynn Cafeteria, Inc.

ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE
2211 DRYADES STREET

BY: ____________________

ALVIN JONES
503½ S. RAMPART STREET

OF COUNSEL:

ERNEST N. MORIAL
1821 ORLEANS AVENUE

REVIUS O. ORTIQUE
2140 ST. BERNARD AVENUE

AUGUSTINE & SMITH
1470 N. CLAIBORNE AVENUE

FREDDIE WARREN
1333 CAFFIN AVENUE

LAWRENCE WHEELER
8820 HICKORY STREET

MSS SEDFRE
546

Chaffee, Lois ~~vs~~ Johnson, Paul R, et al, Feb.-1964 - Sept. 1966
(Part I)

Box 35
Folder 9.

State Historical Society of Wisconsin

Please Retain Original Order

Chaffee

MAR 2 1964

INDICTMENT

THE STATE OF MISSISSIPPI,
First District, Hinds County.

CIRCUIT COURT
November Term, A. D., 1963
FIRST JUDICIAL DISTRICT
OF HINDS COUNTY.

The Grand Jurors for the State of Mississippi, taken from the body of good and lawful men of the First Judicial District of Hinds County, in the State of Mississippi, elected, impaneled, sworn, and charged to inquire in and for said District, County and State aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present: That Lois C. Chaffee

in said District, County and State on the 15th day of October, A. D., 1963 then and there having been sworn and being under oath as a witness in a trial upon an affidavit charging a misdemeanor in Hinds County Court, First Judicial District, Hinds County, Miss., Cause Number 13791, did wilfully, falsely and corruptly swear and testify as follows, to-wit: "The children would hold onto the flags and they were lined up, and they had two police going down, getting on either side one at a time, and the police would grab their flags and they had their sticks ready and if the children would hold onto their flags, they crack their sticks - in effect, everybody who was holding on to their flag was getting their head cracked and being clubbed down, and - - ", and further at said time and in the manner and form aforesaid the said Lois C. Chaffee did wilfully, falsely and corruptly swear and testify, "So, the policemen would grab the flags and pull at it, and if there was any resistance, just with the other hand he'd knock them over the head and knock them on the ground. I mean, these billy clubs inflict a bad blow," and further at said time and in the manner and form aforesaid she did wilfully, falsely and corruptly swear and testify, "I would say I saw three or four incidents where I was sure they were hit by the police, but I only saw one child fall with blood gushing and all, you know, right in front of me. I saw lots of bloody heads, ---", all of which said testimony and false swearing the said Lois C. Chaffee well knew to be false, and fraudulent, and said testimony being material to the issues of said trial, all of which

contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

John H Fox Jr
Asst. District Attorney.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

LOIS CHAFFEE,

Plaintiff, :

-against-

PAUL R. JOHNSON, JR., individually and as Governor of the State of Mississippi, JOE T. PATTERSON, individually and as Attorney General of the State of Mississippi, LEON F. HENDRICK, individually and as Judge of the Seventh Circuit of the State of Mississippi, RUSSELL D. MOORE, III, individually and as Judge of the County Court for Hinds County, Mississippi, WILLIAM L. WALLER, individually and as District Attorney for the Seventh District of the State of Mississippi, ALLEN THOMPSON, individually and as Mayor of the City of Jackson, Mississippi, JACK TRAVIS, individually and as Prosecutor for the City of Jackson, Mississippi, W. D. RAYFIELD, individually and as Chief of Police of the City of Jackson, Mississippi, J.L. RAY, individually and as Deputy Chief of Police of the City of Jackson, Mississippi, and ROSS R. BARNETT,

Defendants.

CIVIL ACTION
No.
3535 (J)(M)

ORDER TO SHOW CAUSE

NOW on the attached affidavit of LOIS CHAFFEE, duly sworn to the day of March, 1964, the summons and complaint herein, it is hereby

ORDERED that the defendants herein show cause before this Court on the day of March, 1964, why an interlocutory order should not be entered restraining the defendants herein from proceeding in any way with the prosecution and/or imprisonment of plaintiff, LOIS CHAFFEE, for perjury as a result of testimony given by her at a trial held in Hinds County Court, Hinds County, Mississippi, on October 15, 1963, and from arresting or having indicted any other person of her class for perjury merely upon the basis of a conflict between the testimony of such person and other witnesses at a trial in the Courts of the State of Mississippi; and for good cause shown; it is hereby further

ORDERED that, pending the return, hearing, and determination of this Order to Show Cause, the defendants herein be and they hereby are restrained from proceeding in any way with the prosecution and/or imprisonment of plaintiff LOIS CHAFFEE for perjury; and it is further

ORDERED that this temporary restraining order shall expire by its own terms ten days from this date unless extended for an additional ten day period for good cause shown; and it is further

ORDERED that service of this Order to Show Cause by personal service or by leaving it at the place of business of each of the defendants by o'clock in the - noon of the day of March, 1964.

SO ORDERED.

United States District Judge.

IN THE CIRCUIT COURT FOR
HINDS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI,
Plaintiff

V. No. 17908

LOIS CHAFFEE,
Defendant

ORDER

The defendant having moved to quash the indictment herein and this Court having heard the arguments of counsel and having thoroughly considered the premises,

IT IS HEREBY ORDERED ADJUDGED AND DECREED:

That the indictment returned by the Hinds County grand jury at the November, 1963 term of this Court charging this defendant with the offense of "perjury" is quashed and the cause against said defendant is continued until the next term of this Court.

CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21686

U. S. COURT OF APPEALS
FILED
JUN 23 1964
EDWARD W. WADSWORTH
CLERK

LOIS CHAFFEE,

Appellant,

vs

PAUL B. JOHNSON, JR., individually
and as Governor of the State of
Mississippi, ET AL,

Appellees

Before JONES, BROWN and BELL, Circuit Judges

BY THE COURT:

IT IS ORDERED That the appellant shall have fifteen days from the entry of this order within which to file briefs, which may be in typewritten form in five legible copies, with a copy served upon counsel for the appellee, in support of her appeal from the order denying leave to appeal in forma pauperis and in support of her application for a stay pending appeal, and the appellees may file briefs in like form and number in opposition, within fifteen days after receipt of copy of appellant's brief. Pending further order of the Court, the prosecution of the appellant is stayed.

File

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 21638

LOIS CHAFFEE, APPELLANT

VS.

PAUL B. JOHNSON, JR., individually and as
Governor of the State of Mississippi,
JOE T. PATTERSON, individually and as
Attorney General of the State of Mississippi,
LEON F. HENDRICK, individually and as Judge
of the Seventh Circuit of the State of
Mississippi, RUSSELL D. MOORE, III, individually
and as Judge of the County Court for Hinds County,
Mississippi, WILLIAM L. WALLER, individually and as
District Attorney for the Seventh District of the
State of Mississippi, ALLEN THOMPSON, individually
and as Mayor of the City of Jackson, Mississippi,
JACK TRAVIS, individually and as Prosecutor for the
City of Jackson, Mississippi, W. D. RAYFIELD, individually and as Chief of Police of the City of
Jackson, Mississippi, J. L. RAY, individually and
as Deputy Chief of Police of the City of Jackson,
Mississippi, and ROSS R. BARNETT, APPELLEES

PETITION OF APPELLEES FOR ADDITIONAL TIME TO FILE BRIEF

COME the Appellees by their attorneys and petition the Court to enter an Order herein granting them thirty (30) additional days from the date of the Order during which they can file their Reply Brief herein.

The receipt of the Brief from Appellant found the limited number of attorneys for the Appellees with any training or experience in this type of case involved in court proceedings. Appellant has filed a lengthy brief relying on 34 different authorities often merely cited with no help as to facts or particular point of law involved, each of which must be carefully read and analysed. Preparation of Appellees' brief requires additional time.

Respectfully submitted,

HONORABLE E. W. STENNETT
HONORABLE R. W. NICHOLS
HONORABLE JACK TRAVIS
HONORABLE THOMAS H. WATKINS
HONORABLE JOE T. PATTERSON
HONORABLE WILL S. WELLS

By________________________________

Attorneys for Appellees

CERTIFICATE

The undersigned of counsel for Appellees hereby certifies that a true and correct copy of the above and foregoing Petition for additional time has this day been mailed by United States mail, postage prepaid, to:

Paul O'Dwyer
O'Dwyer & Bernstien, Attorneys
50 Broad Street
New York 4, New York

Carl Rachlin, Attorney
38 Park Row
New York, New York

R. Jess Brown, Attorney
125-1/2 North Parish Street
Jackson, Mississippi

This the 3rd day of February, A. D. 1965.

____
OF COUNSEL

SEP 21 19[illegible]

U. S. COURT OF APPEALS
FILED
SEP 18 1964
EDWARD W. WADSWORTH
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 21638

LOIS CHAFFEE,
Appellant,
vs
PAUL R. JOHNSON, JR. Etc., ET AL,
Appellees

Before JONES, BROWN and BELL, Circuit Judges

By the Court:

The order of the district court denying to the appellant leave to appeal in forma pauperis is hereby reversed and leave to appeal in forma pauperis is hereby granted. The appeal may be heard on the original record. A stipulation of the parties has rendered moot the application of the appellant for other relief and such relief is therefore denied.

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Chaffee
file

SEP 28 1964

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

New Orleans, Louisiana

Please be advised that briefs from both parties must be on file in advance of the assignment of this case for hearing on a yet undetermined date during this next Term beginning in October of this year. Accordingly, in order that this Court may meet its schedule of sittings for this entire next Term, your brief should be filed on time in accordance with the Court's rules.

Edward W. Wadsworth
EDWARD W. WADSWORTH,
Clerk

SEP 28 1964

COURT RULES

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Before: Tuttle, Chief Judge and Rives, Jones, Brown, Wisdom, Gewin, and Bell, Circuit Judges.

ORDER ADOPTING RULE 23(6)

It is ORDERED that the rules of this court be and they are hereby amended by adding § (6) to Rule 23, as follows:

(6) The provisions of subdivisions (a), (b), (c), (d), (e), (f), (g) and (i) of Rule 75, Federal Rules of Civil Procedure, are not applicable to appeals to this court from a District Court.

Dated: July 28, 1964

ORDER ADOPTING RULE 24(2) (e)

It is ORDERED that the rules of this court be and they are hereby amended by adding subsection (e) to Rule 24(2), as follows:

(e) Except by permission of the court, briefs shall not exceed 50 pages of standard typographic printing or 70 pages of printing by any other process of duplicating or copying, exclusive of pages containing the table of contents, tables of citations and an addendum containing statutes, rules, regulations, etc.

Effective: September 1, 1964

United States Court of Appeals for the Fifth Circuit

New Orleans La.
September 22, 1964

FOR INFORMATION OF ALL COUNSEL—PLEASE READ CAREFULLY:

Re: No. **21638 - LOIS CHAFFEE -vs- PAUL B. JOHNSON, JR., ETC., ET AL.**

The record in the above entitled case is in final form. The time for filing BRIEFS is indicated in the following rule.

RULE 24, as amended, Subsections 1, 3 and 4 OF THIS COURT, READ IN PERTINENT PART AS FOLLOWS:

1. The Clerk shall mail a notice to each party or his counsel so soon as the record by printing, or otherwise, is in final form for a hearing. The counsel for the appellant, or petitioner, shall file with the Clerk of this Court within thirty days from the RECEIPT of such notice *** twenty copies of a printed brief, one to be signed in handwriting by an attorney of this Court who has entered an appearance in the case; together with a certificate that a copy has been mailed to or previously served on the opposite party or parties. Four copies of typewritten briefs in behalf of poor persons in forma pauperis cases, with a like certificate of service, shall be sufficient. [All such typewritten briefs (motions or petitions, etc.) should be backed when filed.]**

3. The Counsel for appellee or respondent shall file with the Clerk of this court within twenty (20) days from the service upon him of opponent's brief *** twenty copies of a printed brief, with a certificate that a copy has been mailed to or personally served on his opponent or opponents. His brief shall be of a like character with that required of the appellant or petitioner, except that no specification of errors shall be required and no statement of the case unless that presented by the appellant or petitioner is controverted.**

4. Reply or supplemental briefs in printed form, and containing a certificate of service upon opposing counsel, may be filed at any time without special leave of court.

Certificate of service upon *all* opposing counsel *must* be incorporated in *all* copies of briefs, motions, petitions or other documents filed.

Since the Court desires that briefs from all parties be on file for its consideration well in advance of the assigned date for hearing, counsel should make every effort to file their briefs by the date due.

Notice will be issued to all counsel for whom an appearance has been entered of the date and place fixed for hearing, usually at least thirty (30) days in advance thereof.

RULE 25, as amended January 19, 1956, reads in part as follows:

"Not more than one-half hour on each side will be allowed for the argument, without special leave of the court **." (See important notation below)*

However, counsel for any party may waive oral argument and submit his case on brief, if he so desires, and notifies this office by the date fixed for hearing.

Any written request for special handling not provided for in the Rules, whether by formal motion, letter or otherwise, as well as any information which counsel desire the Clerk to communicate to the Court, should be submitted in quadruplicate, with an original and three legible copies.

EDWARD W. WADSWORTH
Clerk

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* In order to facilitate the calendaring of the cases so that each day's arguments will not be unduly extended, the Clerk's office must be advised by the time the briefs are filed as to how many counsel will expect argument (not more than two for each party), and how much time each will need. This is particularly true of multi-party appeals. The Court upon the hearing "may allow such less time as shall appear to it sufficient for a fair presentation of the questions involved . . ." Rule 25 (3).

Lois Chaffee

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

ROOM 408 - 400 ROYAL ST.
NEW ORLEANS, LA. 70130

November 2, 1964

Miss Loryce Wharton
Clerk
U. S. District Court
Jackson, Miss.

Re: No. 21638 - Lois Chaffee vs. Paul
B. Johnson, Jr., etc.,
Et Al
(D.C. No. C.A. 3535 (J)(M)

Dear Miss Wharton:

Find enclosed certified copy of order this day entered in the referenced cause, which order amends this Court's order filed on September 18, 1964.

Please acknowledge receipt.

Sincerely yours,
Edward W. Wadsworth

EDWARD W. WADSWORTH,
Clerk

jc
enc.

cc and enc.:
Mr. R. Jess Brown
Mr. Paul O'Dwyer
Mr. Carl Rachlin
Mr. Will S. Wells
Mr. E. W. Stennett
Mr. Thomas H. Watkins

U. S. COURT OF APPEALS
FILED
NOV 2 1964
EDWARD W. WADSWORTH
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 21638

- -x

LOIS CHAFFEE,

Appellant,

-against-

PAUL B. JOHNSON, JR., individually,
and as Governor of the State of
Mississippi, ET AL.,

Appellees.

- -x

O R D E R

Before JONES, BROWN and BELL, Circuit Judges.
By the Court:

The order of this Court filed herein on September 18, 1964, is hereby amended to add the following:

Certification is hereby made, pursuant to 28 U.S.C. § 753(f), that the appeal herein from the decision and order of the court below denying plaintiff's motion for a temporary injunction is not frivolous but presents a substantial question. A transcript of the hearing held in the court below on April 20, 1964, shall be prepared by the reporter of that court, and the fee for such transcript shall be paid by the United States (through the Administrative Office of the United States Courts) pursuant to said statute. Said transcript shall be sent by the clerk of the court below to counsel for

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appellant, Paul O'Dwyer, Esq., 50 Broad Street, New York 4, New York.

A copy of said transcript shall be prepared and delivered without fee to the clerk of the court below for its records, pursuant to that part of 28 U.S.C. § 753(f) which provides that a reporter of a district court "shall not charge a fee for a copy of a transcript delivered to the clerk for the records of the court." Said copy shall then be forwarded to the Clerk of this Court and made a part of the record on appeal herein.

IN THE CIRCUIT COURT FOR
HINDS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI,
Plaintiff

V. No. 17908

LOIS CHAFFEE,
Defendant

MOTION TO QUASH INDICTMENT

Now comes the defendant Lois Chaffee by her attorneys and moves to quash the indictment herein and as grounds therefore would show that:

1. Defendant was indicted in the November, 1963 term of the Hinds County Circuit Court on a charge of "perjury" by a Hinds County grand jury selected pursuant to section 1762 Miss. Code Ann. (1942) which is unconstitutional on its face because it wholly excludes women from grand jury service in violation of defendant's right to equal protection of the laws guaranteed by the 14th Amendment of the United States Constitution.

2. Said grand jury was unconstitutionally constituted and therefore the indictment returned by it against the defendant herein denies her right to the equal protection of the laws and must be quashed.

3. The evidence was insufficient to warrant indictment.

WHEREFORE, defendant prays that this honorable Court grant her motion to quash said indictment.

Respectfully submitted,

s/R. Jess Brown.

R. Jess Brown
Alvin J. Bronstein
Malcolm Farmer, III

603 N. Farish Street
Jackson, Mississippi

Attorneys for Defendant

Of counsel: Paul O'Dwyer, Esq.
New York, New York

IN THE CIRCUIT COURT FOR
HINDS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI,

Plaintiff

V. No. 17908

LOIS CHAFFEE,

Defendant

DEMURRER

Now comes the defendant Lois Chaffee by her attorneys and respectfully submits this her demurrer to the indictment filed and exhibited against her in the above numbered cause, and assigns as grounds therefor the following:

1. The indictment charges no crime known to the law and is therefore wholly void.

2. The alleged false testimony of the defendant was not material to the issues at the trial at which said testimony was made, as is evident from the face of the indictment. The indictment is therefore wholly void.

3. The indictment is further defective and void because of the failure to allege what the true facts were, which were alleged to have been falsely stated by the defendant.

4. And for other and further causes as may be assigned upon the hearing.

Respectfully submitted,

s/R. Jess Brown

R. Jess Brown
Alvin J. Bronstein
Malcolm Farmer III

603 North Farish Street
Jackson, Mississippi
Attorneys for Defendant

Of counsel:
Paul O'Dwyer, Esq.
New York, New York

IN THE CIRCUIT COURT FOR
HINDS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI,

Plaintiff

V. No. 17908

LOIS CHAFFEE,

Defendant

MOTION TO QUASH

Now comes the defendant Lois Chaffee by her attorneys and moves to quash the indictment herein and as additional grounds therefore would show that:

1. The alleged false testimony of the defendant was not material to the issues at the trial at which said testimony was made.

2. And for other and further causes as may be assigned upon the hearing.

Respectfully submitted,

Jess Brown

R. Jess Brown
Alvin J. Bronstein
Malcolm Farmer, III

603 North Farish Street
Jackson, Mississippi
Attorneys for Defendant

Of counsel:
Paul O'Dwyer, Esq.
New York, New York

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served copies of the foregoing motion and order on Honorable William L. Waller, District Attorney by handing same to him this _______ day of July, 1966.

____
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served copies of the foregoing motion and order on Honorable William L. Waller, District Attorney by handing same to him this 7th day of July, 1966.

s/ Malcolm Farmer Sr.
Attorney for Defendant

Certificate of Service

I hereby certify that I caused to be served copies of the foregoing motion and order on Honorable William L. Waller, Distric Attorney by handing same to him this ________day of July, 1966.

Attorney for Defendant

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21638

- -x

LOIS CHAFFEE,

Appellant,

-against-

PAUL B. JOHNSON, JR., individually,
and as Governor of the State of
Mississippi, ET AL.,

Appellees.

- -x

MOTION

Appellant moves this Court to enter an order pursuant to 28 U.S.C. § 753(f) in the form attached hereto amending its order of September 18, 1964. Section 753(f) provides as follows:

> "(f) Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. He shall not charge a fee for any copy of a transcript delivered to the clerk for the records of court. Fees for transcripts furnished in criminal or habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose. Fees for transcripts furnished in other proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or

> a circuit judge certifies that the appeal is not frivolous but presents a substantial question. The reporter may require any party requesting a transcript to prepay the estimated fee in advance except as to transcripts that are to be paid for by the United States."

Appellant moves for such order on the ground that this Court has already determined, as the basis for its order of September 18, 1964, that the instant appeal is not frivolous but presents a substantial question. Given the existence of such a determination herein, counsel for appellant is of the opinion that she is entitled to a certification and transcript at the expense of the United States. Such a transcript is necessary for adequate prosecution of the appeal herein.

To deny one adjudicated a poor person under 28 U.S.C. § 1915 a free transcript pursuant to 28 U.S.C. § 753(f) where, as in this case, such is necessary for effective advocacy would constitute an invidious discrimination against appellant in violation of her right to due process of law under the Fifth Amendment to the Constitution of the United States. Hardy v. United States, 375 U.S. 277 (1964); Draper v. Washington, 372 U.S. 487 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Fulwood v. Clemmer, 295 F.2d 171, 174 (D.C. Cir. 1961); Gideon v. Wainwright, 372 U.S. 335 (1963); Coppedge v. United States, 369 U.S. 538 (1962).

Counsel hereby waives oral argument on this motion and elects not to submit a brief in connection herewith.

O'DWYER & BERNSTIEN
Attorneys for Appellant
Office & P. O. Address
50 Broad Street
New York 4, New York

Paul O'Dwyer, Esq.
of counsel.

CARL RACHLIN
Attorney for Appellant
Office & P. O. Address
38 Park Row
New York, New York

R. JESS BROWN
Attorey for Appellant
Office & P. O. Address
125-1/2 North Farish Street
Jackson, Mississippi

Attorneys for Appellant

By Paul O'Dwyer

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21638

- -x

LOIS CHAFFEE,

Appellant,

-against-

PAUL B. JOHNSON, JR., individually,
and as Governor of the State of
Mississippi, ET AL.,

Appellees.

- -x

ORDER

By the Court:

The order of this Court filed herein on September 18, 1964, is hereby amended to add the following:

Certification is hereby made, pursuant to 28 U.S.C. § 753(f), that the appeal herein from the decision and order of the court below denying plaintiff's motion for a temporary injunction is not frivolous but presents a substantial question. A transcript of the hearing held in the court below on April 20, 1964, shall be prepared by the reporter of that court, and the fee for such transcript shall be paid by the United States (through the Administrative Office of the United States Courts) pursuant to said statute. Said transcript shall be sent by the clerk of the court below to counsel for appellant, Paul O'Dwyer, Esq., 50 Broad Street, New York 4, New York.

A copy of said transcript shall be prepared and delivered without fee to the clerk of the court below for its records, pursuant to that part of 28 U.S.C. § 753(f) which provides that a repoter of a district court "shall not charge a fee for a copy of a transcript delivered to the clerk for the records of the court." Said copy shall then be forwarded to the Clerk of this Court and made a part of the record on appeal herein.

CERTIFICATE

The undersigned of counsel certifies that true and correct copies of the foregoing motion and order were this day mailed by United States mail, postage pre-paid, to the following of counsel for defendants-appellees:

HON. WILL S. WELLS
Assistant Attorney General
of Mississippi
P. O. Box 220
Jackson, Mississippi

E. W. STENNETT, ESQ.
P. O. Box 17
Jackson, Mississippi

THOMAS H. WATKINS, ESQ.
800 Plaza Building
P. O. Box 650
Jackson, Mississippi

October 26, 1964

By ______________________
of counsel

JACKSON DIVISION

LOIS CHAFFEE,

Plaintiff,

-against-

Full caption

PAUL B. JOHNSON, individually,
etc., et al.,

Defendants.

AMENDED COMPLAINT

JURISDICTION OF THE COURT

1. This is an action under Title 42, United States Code, §§ 1981, 1983, 1985, 1986 and 1988 to enjoin the deprivation by the defendants, acting individually and in concert, under color of the law, custom and usage of the State of Mississippi, of plaintiff's rights, privileges and immunities secured by the First and Fourteenth Amendments to the Constitution of the United States and by Title 42, United States Code, §§ 1981, 1983, 1985, 1986 and 1988. Plaintiff seeks to enjoin the enforcement, execution and operation of §1762 of the Mississippi Code governing the selection of jurors to serve on grand and petit juries in the State of Mississippi on the ground that said statute is contrary to the Constitution of the United States; to enjoin the trial of plaintiff by a petit jury selected pursuant to said statute; and to quash the indictment of plaintiff returned

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statute. Plaintiff also seeks to permanently enjoin the defendants from prosecuting her for perjury under §2315 of the Mississippi Code on the ground that the application of said statute to plaintiff violates her rights, guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and by Title 42, United States Code §§ 1981, 1983, 1985, 1986 and 1988, and that such prosecution is being conducted solely for the purpose of penalizing and harassing plaintiff for having criticized police officials and engaged in civil rights activities. Jurisdiction of this Court is invoked pursuant to Title 28, United States Code §§ 1343 and 2201. The convening of a three-judge court is required pursuant to Title 28, United States Code, §§ 2281 and 2284.

2. Plaintiff Lois Chaffee is an adult female citizen of the United States and of the State of Idaho who has been actively engaged on behalf of the Congress of Racial Equality in lawful and peaceful activities in the State of Mississippi aimed at securing to the members of the Negro race who are residents of said State the full enjoyment of the rights guaranteed to them by the Constitution and laws of the United States.

3. Defendant Paul B. Johnson, Jr. is a resident of the State of Mississippi and has been since January 1964, the Governor of the said State charged with the duty of executing its statutes and laws. He is sued individually and in his official capacity as Governor.

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State of Mississippi and is, and was at all times mentioned herein, the Attorney General of said State, responsible for enforcement of its civil and criminal statutes and laws. He is sued individually and in his official capacity as Attorney General.

5. Defendant Leon F. Hendrick is a resident of the State of Mississippi and is, and was at all times mentioned herein, Judge of the Seventh Circuit of said State, responsible for the administration of the courts, the trial of felonies and the selection of grand and petit jurors within said circuit. He is sued individually and in his official capacity as Circuit Judge.

6. Defendant William L. Waller is a resident of the State of Mississippi and is, and was at all times mentioned herein, District Attorney for the Seventh District of said State, responsible for the enforcement of its criminal statutes and laws and the prosecution of violations thereof within said district. He is sued individually and in his official capacity as District Attorney.

~~7. Defendant Allen Thompson is a resident of the State of Mississippi and is and was at all times mentioned herein, the Mayor of the City of Jackson, Mississippi, authorized, empowered and directed to have superintending control of all the officers and affairs of said City and to take care that the laws and ordinances thereof are executed. He is sued individually and in his official capacity as Mayor.~~

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7, ~~8.~~ Defendant Jack Travis is a resident of the State of Mississippi and is, and was at all times mentioned herein, City Prosecutor for the City of Jackson, Mississippi, charged with the duty of prosecuting, within said City, violations of the ordinances thereof and violations of the criminal statutes and laws of the State of Mississippi. He is sued individually and in his official capacity as City Prosecutor.

~~9. Defendant W. D. Rayfield is a resident of the State of Mississippi and is, and was at all times mentioned herein, Chief of Police of the City of Jackson, Mississippi, responsible for the enforcement, within said City, of the ordinances thereof and of the criminal statutes and laws of the State of Mississippi. He is sued individually and in his official capacity as Chief of Police.~~

~~10. Defendant J. O. Ray is a resident of the State of Mississippi and is, and was at all times mentioned herein, Deputy Chief of Police of the City of Jackson, Mississippi. He is sued individually and in his official capacity as Deputy Chief of Police.~~

~~11. Defendant Ross J. Barnett is a resident of the State of Mississippi, and was at all times mentioned herein prior to January 1964, the Governor of the State of Mississippi. He is sued individually.~~

8 ~~12.~~ Defendant Russell D. Moore, III is a resident of the State of Mississippi and is, and was at all times mentioned

herein, a Judge of the County Court of Hinds County, Mississippi, responsible for the administration of said court and for the trial of misdemeanors within said County.

~~13~~ 9. Defendants, ____________________, ____________________,
________________________, ________________________,
________________________, and ________________________
are residents of the State of Mississippi and are members of the Board of Supervisors of Hinds County, Mississippi, empowered, authorized and directed by the statutes of the State of Mississippi to prepare lists of all persons within said County who are competent to serve as grand or petit jurors in the courts of said County. They are sued individually and in their official capacities as members of the Hinds County Board of Supervisors.

FIRST CLAIM FOR RELIEF

~~14~~ 10. On June 13, 1963 an orderly demonstration by a group of youthful Negro students was held in Jackson, Mississippi, to mourn and to protest the slaying two days earlier of Medgar Evers, the field representative of the NAACP in Mississippi. The Negro children, many of whom were carrying small American flags, ~~had been~~ were marching peacefully and silently up ~~on the sidewalk of~~ Rose Street, ~~without causing any interference with or obstruction to traffic,~~ when they were stopped by a large number of helmeted Jackson policemen, armed with guns and billy clubs and under the direction of

7

crowd who gathered to witness this confrontation of the policemen and the Negro children.

~~15~~ 11. Plaintiff stood on the nearby curb and watched as the policemen, without any provocation or justification, surrounded the marchers, placed them under arrest, and began loading them into paddy wagons and garbage disposal trucks which had been assembled for the purpose of carrying them off. As the children were being rounded up and thrown into the trucks, the policemen forcibly wrested the American flags from the hands of many who clung to them under urging from the surrounding crowd. ~~tenaciously~~. Plaintiff watched these struggles and saw the policemen use their clubs to strike ~~such~~ the children who refused to give up their flags,

~~16~~ 12. Many of the spectators to this scene had by this time begun to chant and cry out to show their sympathy for, and to give their moral support to, the demonstrators. Although at no time did the spectators become disorderly or was any breach of the peace likely, defendant Ray threatened to arrest them and set his policemen upon them. With flailing clubs the policemen charged into the group, indiscriminately striking men, women and children. During the ensuing melee, at least one person was beaten into unconsciousness and many were injured. Plaintiff went to the aid of a fifteen year old girl who had been struck on the head by a policeman and when she entreated ~~a policeman~~ Defendant Ray to summon help for the hysterical child, she was arrested.

~~17~~ 13. Plaintiff was subsequently charged with disorderly no basis in fact for such charge. Upon information and belief, ~~P~~laintiff was arrested and prosecuted solely because she was a white woman who was ~~in the presence of~~ associated with~~,~~ and in sympathy with~~,~~ Negroes and their cause.

14. ~~18~~. Plaintiff was tried on this charge in the County Court of Hinds County before defendant Russell D. Moore, III, and an all white, male jury. The City~~'s~~ of Jackson's case rested solely on charges, constitutionally invalid on their face, that the plaintiff had participated in the vocal support that the spectators had given to the demonstrators and had urged them not to give up the American flags which they were holding. Plaintiff took the stand in her own defense, testifying both as to her innocence on these charges, and in great detail~~,~~ as to the events which had taken place on the day of the demonstration. Among other things, she described the brutality with which the police treated both ~~the~~ demonstrators and ~~the~~ bystanders alike. Despite the constitutional deficiency of the charge of disorderly conduct and the absence of any credible evidence to support it, plaintiff was convicted and sentenced to sixty days in jail. Plaintiff's appeal from this conviction is still pending.

15. ~~19~~. Immediately after the jury returned its verdict of guilty, defendant Moore instructed the prosecuting attorney, defendant Travis, to deliver the minutes of the trial to the District Attorney, defendant Waller, to present to the Grand Jury

based upon the inconsistency between her testimony concerning the behavior of the police, on the one hand, and the testimony of the police Deputy ~~Chief of Police, defendant Ray~~, ~~and newspaper reports,~~ on the other. ~~hand.~~ Upon the basis of this inconsistency alone, defendant Moore ordered plaintiff bound over to the grand jury and set the excessive sum ~~amount~~ of two thousand ($2,000) dollars as bail for her release.

11. ~~20.~~ During the November 1963 term of the Hinds County Circuit Court, the grand jury returned an indictment charging plaintiff with having committed perjury when she ~~had~~ testified at her trial as to brutal treatment of the demonstrators by the Jackson police. The indictment stated that plaintiff Lois Chaffee:

> " . . . did wilfully, falsely and corruptly swear and testify as follows, to-wit: 'The children would hold onto the flags and they were lined up, and they had two police going down, getting on either side one at a time, and the police would grab their flags and they had their sticks ready and if the children would hold onto their flags, they crack their sticks - in effect, everybody who was holding on to their flag was getting their head cracked and being clubbed down, and -- ', and further at said time and in the manner and form aforesaid the said Lois C. Chaffee did wilfully, falsely and corruptly swear and testify, 'So, the policemen would grab the flags and pull at it, and if there was any resistence, just with the other hand he'd knock them over the head and knock them on the ground. I mean, these billy clubs inflict a bad blow,' and further at said time and in the manner and form aforesaid she did wilfully, falsely and corruptly swear and testify, 'I would say I saw three or four incidents where I was sure they were hit by the police, but I only saw one child fall with blood gushing and all, you know, right in front of me. I saw lots of bloody heads, -- ', all of which said testimony and false swearing the said Lois C. Chaffee well knew to be false

A copy of the indictment is attached hereto as Exhibit A.

12. ~~21~~. On its face the indictment charges plaintiff with having testified as to matters which were clearly immaterial and irrelevant to the issue of whether she was guilty of disorderly conduct in violation of the Jackson ordinance. The excerpts of plaintiff's testimony quoted in the indictment and the transcript at the trial establish that plaintiff cannot be constitutionally convicted for such speech.

16. ~~22~~. At her arraignment, plaintiff pleaded not guilty. Bail was raised from two thousand ($2,000) dollars to five thousand ($5,000) dollars and plaintiff was incarcerated in the Jackson City jail. Seventeen days later the additional bail was raised and plaintiff was released. A trial has not been held because of the pendency of these proceedings.

18 ~~23~~. The selection of jurors to serve on grand and petit juries in the State of Mississippi is governed by §1762 of the Mississippi Code, entitled "Who are competent jurors," ~~and~~ which states in pertinent part:

> "Every male citizen not under the age of twenty-one years, who is a qualified elector and able to read and write, has not been convicted of an infamous crime, or the unlawful sale of intoxicating liquors within a period of five years and who is not a common gambler or habitual drunkard is a competent juror . . ." (Emphasis added.)

A copy of said statute is attached hereto as Exhibit B.

~~24.~~ 20. The defendant members of the Board of Supervisors of Hinds County, who are directed by Mississippi statutes to compile lists of competent persons to serve on grand and petit juries in Hinds County, are prevented by the aforesaid §1762 from including any women on such list. Defendant Hendrick, Circuit Judge of Hinds County, who is directed by Mississippi statutes to select from said list ~~compiled by the defendant members of the Board of Supervisors of Hinds County~~ the persons who will serve as grand and petit jurors during each term of the Circuit Court of Hinds County, is thereby prevented from including any women on such juries. Upon information and belief, no woman has ever served on any grand or petit jury in Hinds County or in any county in the State of Mississippi as a result of the operation of said §1762 of the Mississippi Code.

~~25.~~ 21. Said Section 1762 of the Mississippi Code is void and unconstitutional on its face in that it excludes women as a class from service on grand and petit juries in the State of Mississippi and in the County of Hinds in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States. Said exclusion of all otherwise qualified women from service on grand and petit juries is an arbitrary and capricious classification which denies to plaintiff her rights under said ~~Equal Protection Clause~~ Amendment to be indicted by a grand jury and tried before a petit jury from which women have not been excluded and deprives all women residents of the State of

Mississippi and of the County of Hinds of their rights as citizens of said State to serve on grand and petit juries.

27. ~~26.~~ By reason of the fact that plaintiff was indicted for perjury by an unconstitutionally constituted grand jury, and will be tried on said perjury indictment by an unconstitutionally constituted petit jury, plaintiff has been, continues to be, and will be denied due process of law and the equal protection of the laws in the State of Mississippi in violation of the Constitution of the United States.

23. ~~27.~~ Unless this Court declares that said Section §1762 of the Mississippi Code is unconstitutional and enjoins its operation with respect to plaintiff both by enjoining her trial before any petit jury selected pursuant to said statute and by ordering that plaintiff's indictment be quashed, plaintiff will suffer irreparable harm by being needlessly forced to undergo the notoriety and bear the financial burden of ~~a felony prosecution in Mississippi before she can vindicate her constitutional rights.~~ defending against a patently defective felony prosecution.

24. ~~28.~~ On the basis of the foregoing, plaintiff will continue to be denied due process and ~~the~~ equal protection of the laws, for which she has no adequate remedy at law~~, unless this Court grant the relief requested in the prayer below~~.

SECOND CLAIM FOR RELIEF

25 ~~29.~~ Plaintiff repeats and realleges paragraphs 10 ~~13~~ through 24 ~~26~~ of this Complaint with full force and effect as if fully set forth herein.

30. The prosecution of plaintiff for perjury under section §2315 of the Mississippi Code because of her testimony concerning the use of illegal and excessive force by Jackson policemen while making arrests of demonstrators on June 13, 1963 is unconstitutional in that it penalizes plaintiff for her exercise of rights of free speech, guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, to testify freely in her own defense and to criticize the conduct of the law enforcement officials of the City of Jackson. Said prosecution would also render meaningless plaintiff's right to a fair trial, guaranteed by the Due Process Clause of the Fourteenth Amendment, because it would penalize her for presenting candid testimony in her own behalf.

31. Said prosecution of plaintiff for allegedly giving wilful, false and corrupt testimony with respect to the conduct of Jackson policemen has no basis in fact and, upon information and belief, such prosecution was instigated and undertaken by defendants Moore, Travis, ~~and~~ Waller, acting individually and in concert, for the sole purpose of harassing plaintiff because of her association with and active support of the civil rights ~~movement~~ activities in Mississippi and to intimidate and punish plaintiff for having freely and openly criticized the police officials of Jackson. Upon information and belief even though said defendants have no real hope of ultimate success in this prosecution, ~~but~~ they have nevertheless procured the indictment of plaintiff, set her bail at the excessive and unreasonable sum of five thousand ($5,000) dollars, and intend to compel plaintiff to undergo the hardship and expense of a trial, all for the purpose of discourag-

ing the activities of plaintiff and of other persons connected with the civil rights movement in Mississippi, and in particular, for the purpose of discouraging such persons from presenting testimony for the defense and otherwise actively defending the criminal prosecutions which grow out of such activities. This prosecution is part of a pattern of vigorous persecution and intimidation of all persons involved in ~~the~~ civil rights ~~movement~~ activities in Mississippi maintained and encouraged by each of the defendants, individually and in ~~their~~ his official capacity.

32. Upon information and belief, the effect of this perjury prosecution of the plaintiff and the implicit threat of future perjury prosecutions under similar circumstances is to deter persons involved in the civil rights movement from risking a perjury prosecution which will entail imprisonment, or custody under excessive bail, if not a substantial jail sentence, by testifying on their own behalf or on behalf of others in civil or criminal cases. The threat of the imposition of this sanction of prosecution for perjury as a result of the attempt to vindicate civil rights by testifying in judicial proceedings not only abridges ~~the~~ freedom of speech but it ~~is a~~ depriv~~ation~~es of the rights sought to be vindicated, ~~of~~ all those who may be subject to such sanction.

33. Plaintiff cannot be constitutionally tried and convicted under the present indictment because the exclusion of women from service on grand and petit juries in Mississippi denies plaintiff the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States

and because a conviction of plaintiff for perjury would deprive her of and penalize her for the exercise of rights secured by the First and Fourteenth Amendments to the Constitution of the United States. Plaintiff cannot vindicate these rights in the courts of the State of Mississippi without undergoing arduous and protracted litigation. Even if she eventually were successful, the effect intended by defendants, individually and jointly, of punishing plaintiff for having testified as to police misconduct and for her civil rights activities and of deterring similar speech and civil rights activities would have been achieved. Plaintiff therefore has no adequate remedy at law, and she and many others similarly engaged in ~~the~~ civil rights activities ~~movement~~ will suffer irreparable harm unless this Court enjoins any further prosecution of defendant in the courts of the State of Mississippi based on the aforesaid perjury indictment or on any other perjury indictment based on the same facts and unless this court orders that said indictment be quashed.

PRAYER FOR RELIEF

WHEREFORE, plaintiff LOIS CHAFFEE respectfully prays:

(1) That section §1762 of the Mississippi Code be declared void and unconstitutional;

(2) That defendants, each of them, their agents, successors, employees and all those in concert with them, be permanently enjoined from executing and effectuating the

provisions of said Section §1762 of the Mississippi Code and from excluding women from service on grand and petit juries within the State of Mississippi and within the County of Hinds;

(3) That defendants, each of them, their agents, successors, employees, and all those in concert with them, be permanently enjoined from trying plaintiff before a petit jury from which women were excluded pursuant to Section §1762 of the Mississippi Code;

(4) That the defendants, each of them, their agents, successors, employees, and all those in concert with them be ordered to quash the indictment of plaintiff for perjury and be enjoined from seeking any other indictment of plaintiff by a grand jury from which women have been excluded pursuant to Section §1762 of the Mississippi Code;

(5) That the defendants, each of them, their agents, successors, employees and all those in concert with them, be permanently enjoined from prosecuting plaintiff for perjury based upon her testimony at her trial for disorderly conduct on October 15, 1963;

(6) That a temporary restraining order and/or a preliminary injunction be issued enjoining defendants, each of them, their agents, successors, employees, and all those in concert with them, from prosecuting plaintiff on said perjury charge during the pendency of this action;

(7) That the defendants, each of them, their agents, successors, employees, and all those in concert with them, be ordered to reduce to a reasonable sum the amount of bail upon which plaintiff has been released during the pendency of this action;

(8) That plaintiff be granted such other relief as may be just and proper; and

(9) That this Court retain continuing jurisdiction of this matter.

Respectfully submitted,

United States Court of Appeals

Fifth Circuit

No. 21,638.

LOIS CHAFFEE,

APPELLANT

vs.

PAUL B. JOHNSON, JR.,
individually and as Governor of the State of Mississippi, **ET AL.**

APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

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UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

NO. 21,638.

LOIS CHAFFEE, APPELLANT

vs.

PAUL B. JOHNSON, JR., individually and as Governor of the State of Mississippi, JOE T. PATTERSON, individually and as Attorney General of the State of Mississippi, LEON F. HENDRICK, individually and as Judge of the Seventh Circuit of the State of Mississippi, RUSSELL D. MOORE, III, individually and as Judge of the County Court for Hinds County, Mississippi, WILLIAM L. WALLER, individually and as District Attorney for the Seventh District of the State of Mississippi, ALLEN THOMPSON, individually and as Mayor of the City of Jackson, Mississippi, JACK TRAVIS, individually and as Prosecutor for the City of Jackson, Mississippi, W. D. RAYFIELD, individually and as Chief of Police of the City of Jackson, Mississippi, J. L. RAY, individually and as Deputy Chief of Police of the City of Jackson, Mississippi, and ROSS R. BARNETT, APPELLEES.

BRIEF OF APPELLEES

INTRODUCTORY STATEMENT

This is an appeal from an Order of the District Court of the United States for the Southern District of Mississippi, Jackson Division, denying to the Appellant, Lois Chaffee, a preliminary injunction restraining Appellees from "...continuing to prosecute plaintiff, Lois Chaffee, for perjury under any indictment arising out of her trial for disorderly conduct on October 15th, 1963...".

Appellant is a white employee of the Congress of Racial Equality formerly working in the State of Mississippi.

On June 13th, 1963 she was arrested by police officers of the City of Jackson in connection with an illegal parade over the streets of Jackson for disorderly conduct consisting of disturbing the peace by loud and boisterous language, under Section 963 of the Ordinances of the City of Jackson, revised 1938. Attached as Appendix A is a copy of said Ordinance. The action therefor against her in the City Court was pursuant to an affidavit signed by Appellee Ray. Copy of the same is attached hereto as Appendix B. As disclosed thereby, her plea was nolo contendere and resulted in a fine of $100.00. This misdemeanor cause was appealed by her to the County Court of Hinds County, Mississippi, pursuant to the Statutes of the State of Mississippi, and there tried de novo. The county court jury trial resulted in a conviction.

Whether or not Appellant was properly convicted in said misdemeanor case is not before this Court on this appeal and is not pertinent to the issue here involved. Her case is still pending on appeal in the state courts. The case may be affirmed or it may be reversed. Her guilt or innocence of the charge of disorderly conduct by disturbing the peace by loud, boisterous language on June 13th, 1963 is immaterial here.

During her jury trial for the misdemeanor, the court being presided on by Appellee County Judge Russell Moore, Judge Moore became convinced, with probable cause, that she was wilfully and corruptly testifying falsely under oath to a material matter. Thereupon he bound her over to the Grand Jury and required her to give bond in the amount of $2,000.00 and ordered Appellee Jack Travis, the prosecuting attorney in said misdemeanor cause, to see that a transcript of the testimony was furnished the District Attorney. This was done pursuant to Section 2479 of the Mississippi 1942 Code, which specifically authorizes a trial judge to so do when a witness in a case he was hearing has testified "in such manner as to induce a reasonable presumption that he has wilfully and corruptly testified falsely to some material point or matter." Copy of Section 2479 is attached hereto as Appendix C.

The question of whether or not Appellant was guilty of perjury was submitted to the Grand Jury and resulted in an indictment for perjury under Sections 2315 and 2316 of the Mississippi 1942 Code, which make a person guilty of perjury if they "wilfully and corruptly" testify falsely to a material matter in a legal proceeding. Copy of Sections 2315 and 2316 are attached as Appendix D. A copy of the indictment of the Appellant by the Grand Jury is attached hereto as Appendix E. Appellant is now awaiting trial under this indictment.

Whether or not Appellant is actually guilty of wilfully and corruptly testifying falsely under oath in said trial is not an issue in this case. She may be acquitted or she may be convicted. She will have full opportunity to present all the defenses which she cares to present and will have a fair trial and a right to an appeal to the Supreme Court of the United States if any of her constitutional rights are violated therein.

The indictment of Appellant for perjury was dated October 15th, 1963. On March 17th, 1964 Appellant filed herein her complaint seeking both money damages and injunctive relief.

The Defendants therein were the Governor of the State, the Attorney General of the State, the Circuit Court Judge of Hinds County, County Court Judge Moore, the District Attorney for the district in which Hinds County is located, the Mayor of the City of Jackson, the Chief of Police and the Deputy Chief of Police of the City of Jackson, and Jack Travis, the Prosecutor for the City in the misdemeanor case. Also included was Ross R. Barnett, former Governor of the State.

By the complaint Appellant sought to obtain money judgments and injunctive relief against all of these Defendants by allegations of a conspiracy under 42 U.S.C. 1985 or by knowledge of such conspiracy and failure to prevent the same under 42 U.S.C. 1986. The only allegations of the complaint were on the basis of these two sections and/or a conspiracy.

Therein Appellant related in great detail facts with reference to the march or parade in Jackson on June 13th, 1963 and her arrest and later conviction for disorderly conduct (Complaint, para. 16, pp. 5-8). Most exhibits were directed to this issue and included long excerpts from newspaper accounts of the incident of June 13th, 1963, all irrelevant and immaterial.

The complaint then alleges facts with reference to the Order of the Judge to have the question of guilt or innocence of perjury presented to the Grand Jury and the indictment after such presentment.

There then appears in the complaint under paragraph 20 an allegation that the Defendants under color of the laws of and customs and usages of the State "...have entered into a plan of conspiracy involving all of them and other persons presently unknown to plaintiff, the purpose and intended effect of which is to intimidate the plaintiff and to punish her unjustly and without cause in violation of rights, privileges and immunities granted to her by the Constitution..."

Each charging paragraph thereafter (i.e., §§21-27, 30-35, inclusive) are predicated on "conspiracy".

Appellant sought to bring her action not only for herself but as a class action on behalf of "all other persons similarly situated who are workers for the end of racial discrimination and segregation in Mississippi, for the encouragement of the exercise by Negroes in Mississippi of their right to vote and to register to vote, and for the exercise and preservation of civil rights generally in Mississippi, whether such other persons are paid or not paid to act as such workers." (Complaint, para. 2, p. 2).

The complaint asked for broad permanent injunctive relief. She prayed first for a permanent injunction restraining "defendants, their agents, co-conspirators, or any other person or persons acting under their direction and control" from continuing the prosecution of her indictment for perjury or any other indictment that might arise out of her trial for disorderly conduct on October 15th, 1963, and from obtaining any other indictments against her or any person of her class, and from generally intimidating, discouraging, hindering or preventing plaintiff or any person in her class from exercising their constitutional rights. The complaint then sought a money judgment against the defendants.

The complaint then sought a preliminary injunction enjoining the defendants from continuing to prosecute plaintiff for perjury under the indictment arising out of her trial for disorderly conduct on October 15th, 1963. This cause technically came on to be heard only on motion for a preliminary injunction enjoining the defendants from prosecuting the pending charge of perjury against appellee herself under the indictment heretofore referred to.

A full hearing was had before the District Judge on April 20th, 1964. Appellant herself did not testify and, we submit, offered no proof whatsoever to justify the charges in the complaint or to justify a Federal Court enjoining the prosecution of a pending criminal state proceeding. The Trial Judge found: "The Plaintiff has, therefore, wholly failed to make a showing which would entitle her to the temporary restraining order which she seeks." (Reported 229 F.Supp. 445).

In the interim the defendants had filed both an Answer and a Motio to Dismiss. The motion to Dismiss was on the ground that the complaint failed to state a claim upon which relief could be granted; that the action was not a proper class action. By the Answer there was a general denial of each and every allegation of the complaint and the allegation that the Court could not grant the injunctive relief prayed for, the same being prohibited by 28 U.S.C., Section 2283.

There has been a preliminary hearing of this matter in this Court at which time the Appellant sought to appeal from the Order of the Judge denying the preliminary injunction in forma pauperis, which said right was granted Appellant by this Court. Appellees have agreed that the prosecution for the perjury charge would be delayed during the pendency of this appeal. The Court now has before it for the first time the transcript of the testimony at the hearing in the Court below.

STATEMENT OF FACTS

The bulk of the statement of facts in Appellant's brief dealt with the occurrences on Rose Street in Jackson on June 13th, 1963, when there were a large number of arrests made for parading without a permit contrary to City Ordinances and during which demonstration Appellant was arrested for disorderly conduct consisting of disturbing the peace by loud and boisterous language. One would think that this was an appeal from this criminal conviction for a misdemeanor or certainly that it was an appeal from a denial of an injunction against further prosecution of this misdemeanor charge against Appellant. This, of course, is not true. Also, Appellant has attached to her brief a group of affidavits, none of which were introduced in the hearing in the Court below, all of which deal only with the occurrences during the demonstration on June 13th. There has been forwarded to this Court a transcript of the testimony at her breach of the peace hearing in the County Court. It reflects without dispute that Judge Moore during said trial had reasonable grounds to believe that Appellant was wilfully testifying falsely on a material matter. We briefly call attention to the testimony therein:

Appellee J. L. Ray, Chief of Police, testified that on June 13th, 1963, a demonstration of approximately 100 people began at the Pearl Street Methodist Church and proceeded to the corner of Rose and Deerpark Avenue; that they had no permit and that all were carrying flags (contrary to a City ordinance). They were mostly young people and they were marching in columns of three in the middle of the street. He testified that he stopped them at Rose and Deerpark and asked about a permit; that they had none; that he gave them an opportunity to disperse and that about 25 left the group but that the remaining 84 were arrested; that the marchers were quiet when arrested but would not voluntarily give up the flags and that policemen took the flags away from them. They were then taken to jail.

Appellant herself was not directly involved in this march. She had followed the same from the church and then came up into the yard of a house adjoining the street. Appellee Ray testified that she was a part of a group standing in the yard and on the porch of the house; that the crowd consisted of 30 or 40 people who were very noisy and were shouting and calling out so that they could be heard for several blocks and were insulting toward the police. That she was part of the group who were chanting and shouting "Don't let them take the flags", directing the remarks to the young people who were standing quietly in the street. That the Appellant was one of this group that was loud and boisterous; that he told them to be quiet and they quieted for a few moments and started again, shouting and attempting to stir the crowd and make the young people resist the orders of the police to give up the flags;* and that the situation was dangerous and explosive and could have probably developed into a riot (T-1, 6-21).

Officer Richard Hart confirmed the fact that Appellant was part of the large group shouting and taunting the police officers and hollering to the demonstrators; that it was a disorderly crowd; that she was arrested for disturbing the peace by disorderly conduct (T-1, 23-28).

Thus the charge against Appellant, and the very charge on which she was being tried at that time, was primarily shouting at and chanting to the demonstrators in loud voices urging them to disobey the orders of the police and urging them to forcibly hold onto the flag.* The testimony for the defendant in the trial was primarily to the effect that she had been merely standing in the yard or on the porch of the house and had not taken part in the shouting and yelling. They all admitted however that the crowd was chanting in a loud voice "Don't let them take the flags." (T-1, 33; T-1, 38). They all admitted that the police had tried to get them to be quiet but that they continued the chanting and that they were making a lot of noise (T-1, 45-48). One witness for the defendant there, Appellant here, Ladner, admitted that "It was a boisterous scene" (T-1, 57). As stated, the defense of Appellant as defendant in that trial was merely that she was not participating in the shouting.

Appellant here, defendant in the misdemeanor case, testified there in her own behalf. She testified first that at the time of the trial she lived in Plaquemine, Louisiana; she then denied that she had participated in the shouting of "Hold on to the flags". Her reason therefor, however, was the basis of the charge of perjury. She testified:

---

* Thus also violating Section 2468 of the Code: "Every person when commanded to do so by an officer seeking to arrest an offender, must aid and assist in making the arrest, and must obey the commands of the officer in respect thereto."

> "... And I was not shouting about 'Hold on to the flags!', because-, and I tell you the reason for it. The children would hold on to the flags, and they were lined up. And they had two police going down, getting on either side, one at the time, and the police would grab their flags, and they had their sticks ready, and if the children would hold on to their flags, they crack their sticks; -- in effect, everybody who was holding on to their flag was getting their head cracked, and being clubbed down, and --" (T-1, 69).

In other words, she said she could not have been so shouting because she saw the children out in the street being cruelly hit in the head if they held on to the flags and therefore she wouldn't have been saying it. This is the substance of her testimony. At this point the Judge warned the witness that she was testifying under oath, asking: "Are you testifying under oath that the police officers knocked people down with their clubs that were standing there waiting to be arrested? A. Yes sir. Q. That's your testimony? A. Yes sir." (T-1, 69-70).

The Judge at that point knew that no other witness who had testified to the happenings of that day for the plaintiff or the defendant had testified to such brutal clubbing of young people who were standing quietly in the street waiting to be arrested, a serious charge against these officers. There had been some testimony that a Mr. Salter, while on the porch of the house, had resisted arrest and been hit by an officer and that a girl had been hurt by someone as she was going into the door of a house, but there had been no suggestion of any testimony of general police brutality to young people in the street quietly waiting to be arrested.

Later Appellant again testified: "...So, the policeman would grab the flags and pull at it, and if there was any resistance, just with the other hand he'd knock them over the head, and knock them on the ground. I mean, these billy clubs inflict a bad blow...and the children who were struck, you know, would be bleeding all down, you know, their faces and they --" (T-1, 77).

Here again the Court interposed and said: "Did you actually see anybody fall down who was hit by an officer? Did you actually --" Her answer was: "Yes sir, in the demonstration. I didn't see people in the crowd where I was falling...Yeah, the kids would fall down when they were hit, and then, they --, you know, get up, and get in the paddy-wagon." (T-1, 78). She again repeated that every time a child held on to the flag he was hit and testified: "Well, I remember one incident especially... I saw three or four incidents where I was sure they were hit by the police, but I only saw one child fall with blood gushing and all, you know, right in front of me. Q. You saw one child in the street with a bloody head? A. No, I saw lots of bloody heads, but I only saw one --" (T-1, 85).

No witness at this hearing confirmed any such occurrences. At the conclusion of the defendant's (Appellant here) testimony, police lieutenant C. R. Wilson testified that he and officer Moulder were the ones who took the flags from the children standing in the street and that some held on to them and they pulled them out of their hands, but that none of them were hit and no violence whatsoever occurred in the street, and no one was hit in the street; that there were no busted heads and no blood (T-1, 92, 94). This was confirmed by Appellee Chief Ray (T-1, 100-103). No rebuttal or confirmatory testimony was offered by Appellant. The jury found that she had participated in the loud and boisterous chanting and urging of the marchers to disobey the orders of the police.

Appellant's indictment for perjury was for the sworn testimony with reference to the extreme police brutality to numbers of children standing quietly in the street waiting to be arrested.

Appellant's motion for preliminary injunction against the prosecution of the perjury charge was heard in the Court below on April 20th, 1964, on oral testimony. Appellant herself did not testify.* In fact, Appellant only introduced three witnesses:

The colored preacher, Reverend Horton, merely testified that Mayor Thompson told him it would be all right for a group of preachers to come to confer with him if they came in a small group; that the day before the occurrence in which the Appellant was arrested thirteen preachers started walking down the street toward the Mayor's office and were stopped and told that they could not see the Mayor and detained at the jail for a few hours and then released without charge. The Court excluded the testimony as irrelevant and immaterial on the issues here (Tr. 33-42).

Appellant's attorney then offered to prove by one Dennis that in his activities for civil rights and particularly since Chaffee had been indicted that he had found that "people are discouraged" from engaging in civil rights activities (Tr. 44). This testimony was excluded as too broad and indefinite.

The attorney for Appellant then offered to prove by one Cotten that at some unidentified time and place in an attempt to register he and eight other persons had been arrested and given four months and had been held as security risks and that their treatment in jail had had the effect of intimidating others from civil rights activities (Tr. 47). Objection thereto was again sustained on the ground that it was too broad and irrelevant to and not within the issues of this case.

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* The record on the hearing in this cause, Civil Cause No. 3533, in the Court below, is separately bound before this Court and will be referred to as "Tr.".

The attorney for the Appellant was then given an opportunity to state any other proof he expected to make. He stated that he merely would offer the testimony of one Evesta Simpson to the effect that in Winona, Mississippi at some unknown time she had been taken to the police station and saw some other woman prisoner, unidentified, who had been beaten and that this had the effect of intimidating civil rights workers (Tr. 49).

With this the Appellant rested and on the basis of this testimony alone seeks the injunction here involved. There was thus not one iota of testimony offered to connect any of these Appellees with any incident at any place or at any time, and not one iota of testimony to show any conspiracy between these Appellees or any deprivation of Appellant's rights by anyone, much less any deprivation of anyone's rights by these Appellees. There was no attempt by Appellant to prove that her indictment for perjury was not justified or that it was the result of any ulterior motives on the part of Appellees or any of them.

On the other hand, each of the Appellees testified and denied both any conspiracy or any deprivation by them of any rights of Appellant or any wrongful motives in securing the indictment of Appellant.

Mayor Thompson testified that he did not know Appellant and had never discussed her activities with any of the other defendants and had never sought to have her indicted for perjury (Tr. 51-2). There was no attempt to connect Mayor Thompson with the perjury indictment or show any authority he had over the pending perjury trial or any right to stop the same or control the courts of Hinds County thereasto.

The same is true with reference to Appellee, Chief of Police Rayfield. He did not make the arrests and merely read of her having been charged with perjury in the newspaper. He did not know her and never discussed her or her activities with any other defendants and had never sought to have her indicted for perjury (Tr. 58-66). His lack of authority over the acts of the County Judge and the County Court or the trial therein or the indictment or any later trial in the Circuit Court for perjury was patent. The testimony of Deputy Chief of Police J. L. Ray was to the same effect except that he was in charge of the group that made the arrests on June 13th but he did not know Appellant and did not seek to have her indicted for perjury or prosecuted therefor but merely knew that she committed a misdemeanor in his presence. (Tr. 67-73).

Appellee Jack Travis testified that he was City Prosecuting Attorney and was charged with the duty of prosecuting Appellant in her disorderly conduct charge; that he had never seen her until the day of her trial; that Chief Ray gave him the investigator's records and he used them to try the case but did not know her. He testified emphatically that he never sought to have her indicted or prosecuted for perjury and had nothing to do with her indictment except to obey the orders of the Judge and had never discussed her or her activities with any of the other defendants and had not discussed prosecuting her for perjury with any one; that he had not encouraged her prosecution for perjury and was not encouraging it now. He testified that at the conclusion of the misdemeanor trial the Judge from the bench instructed him to have a transcript of the record made and to turn it over to the District Attorney to "explore" the possibility of an indictment against her for perjury, i.e., so that the District Attorney might "investigate the possibility of presenting the matter to the Grand Jury with a perjury indictment as a possibility", i.e., that the Judge did not order the Grand Jury to do anything or order the District Attorney to do anything (Tr. 74, 87).

Appellant attempts to make a great deal out of the testimony of

Mr. Travis that he prosecuted all of the City misdemeanor cases and had for seven years and had prosecuted some five or six thousand misdemeanor cases but that this was the first time he had received an instruction to see that a record got to the District Attorney to investigate for perjury. We fail to see how Appellant could get any encouragement from such testimony. This Court knows only too well that out of these misdemeanor cases prior to March, 1964, hundreds of them had been for civil rights activities. The fact that in all of these trials of civil rights cases not one of the witnesses or parties had been charged with perjury on the other hand proves the opposite of the contentions of the Appellant, i.e., that there was no conspiracy on the part of the officers to harass civil rights workers with perjury charges and no pattern of intimidation or threats or punishment of civil rights workers by chargin them with perjury and no motive in anything that Judge Moore did or Mr. Travis did to intimidate or hinder any civil rights activities of Appellant or anyone else or that Appellant's identity as a civil rights worker had anything to do with the charge being brought against her.

Attorney General Patterson testified that he had never seen Appellant before the day of the hearing in this case and had only seen her name in the paper and that he knew nothing about her and had nothing to do with her prosecution in the County Court and being bound over to the Grand Jury, and had never discussed her with any other Appellee. He then pointed out that the Attorney General under Mississippi statutes has no control over local prosecutions and had no authority to stop the prosecution for the perjury charge but, on the other hand, can only assist the District Attorney in a prosecution, not direct him (Tr. 90-93).

It was stipulated that Governor Johnson, if present, would testify that he never heard of Appellant and knew nothing about her activities or her arrest or her prosecution in the County Court or her being bound over to the Grand Jury or her indictment and had never discussed her with anyone. That the first he knew of her was when he was served with a summons in this case.

District Attorney Waller testified that he had never seen Appellant until she was arraigned on a perjury charge after her indictment by the Grand Jury. Before that he knew nothing about her activities except that he had read the record of her trial of October 15th. The record of this trial was turned over to him and by him to his assistant, Fox, who presented it to the Grand Jury; that he never discussed her with any of the other defendants or conspired with any of the other defendants to have her punished for perjury or to intimidate or punish her for her activities (Tr. 96-98).

Judge Moore then testified that he had never known Appellant until she appeared in his court for trial on October 15th, 1963; that he alone bound her over for the Grand Jury in his capacity as Judge; that his act had no connection with and was not based on any agreement with or policy of the other defendants and none of the other defendants had anything to do with it; that in his honest opinion she was testifying falsely under oath when she testified with reference to the extreme police brutality to non-resisting young people standing quietly awaiting arrest. She had testified that she was now in Plaquemine, Louisiana. He then recalled that he had read about her activities in that town and had read about police brutality under the same circumstances and exactly like the brutality that she was here testifying about as having occurred in Jackson. He knew, of course, that no other witness in the misdemeanor trial, testifying with reference to the demonstration on June 13th, 1963, had mentioned any such police brutality. He also knew that the papers had not reported any such brutality and he knew that if these events had occurred in Jackson that the papers would have carried them. He also knew that both Chief Ray and the police officer accused had testified emphatically that there was no such occurrence. He testified that he warned her and gave her an opportunity to retract because he did not want to have to bind her over, and that he then merely did what he considered his duty.

Judge Moore testified that Appellant's activities in the civil rights field had nothing to do with his decision and her activities in Plaquemine had had nothing to do with it. His lack of any attempt to use his position as Judge to intimidate or harass civil rights workers by charging them with perjury was confirmed by the fact that he tried some 300 cases a year and over the last few years had tried some several hundred cases of freedom riders and civil rights demonstrators; that some 50 or 60 had been turned loose by him on a directed verdict; that he had never held any civil rights worker or leader of NAACP, etc. for perjury; that, in fact, he had only held one person, in a civil case, for perjury in his entire term as Judge; that he did not bind a witness over for probable perjury merely because there was a variance between the witness' testimony and that of other witnesses but only did so when he felt that the testimony was wilfully false (Tr. 100-123).

Appellant put on no rebuttal testimony whatsoever. There was not one iota of testimony that she had been indicted for perjury because of any conspiracy among the defendants. There was not one iota of testimony that she was bound over to the Grand Jury for the purpose of intimidating or punishing her because she was a civil rights worker. Appellant did not even purport to offer any testimony that her statement of what occurred on June 13th with reference to the brutality to the children standing in line was true. This, of course, would be an issue for the perjury hearing. However, Appellant's attitude is that any person engaged in any civil rights activity either for pay or gratuitously should be free to commit perjury as they please and should not be questioned about it for fear that it might intimidate someone.

Moreover, as stated, Appellant did not even testify herself. True, she had attached an affidavit to her motion for preliminary injunction, which was not offered in evidence. The only facts stated were that she was a civil rights worker and that she was bound over to the Grand Jury on the order of Appellee Moore for giving certain testimony which she sincerely believed to be true (without the allegation that it was true). The balance of the affidavit consisted purely and simply of inadmissible conclusions; i.e., that there was a conspiracy among the Appellees and that she was indicted and was being tried because she was a civil rights worker and that the motive of the Appellees was to intimidate or punish civil rights workers. The affidavit in these respects is more in the form of a pleading and no facts whatsoever are stated but the statements constitute mere suspicion or opinion or conclusions of the Appellant. While motive, intent and conspiracy can be proved by circumstantial evidence, it must be evidence of circumstantial facts known to the witness and an opinion or conclusion not based on disclosed facts is of no probative value. A witness will not be permitted to express an opinion or conclusion based merely on conjecture or suspicion.[*]

[*] See generally Balaban & Katz Corp. v. Com'r. of Internal Revenue, 30 F.2d 807; Columbus & G. R. Co. v. Coleman, Miss., 160 So. 277. Suspicion of conspiracy is insufficient. Ong Way Jong v. United States, 245 F.2d 392; Evans v. United States, 257 F.2d 121, cert. den., 3 L.ed.2d 99. Mere suspicion, insinuation or presumption of fraud or fraudulent intent is insufficient. Willoughby v. Pope, Miss., 58 So. 705. See generally Parker v. Checker Taxi Co., 238 F.2d 241, cert. den., 1 L.ed.2d 719; Consolidated Gas Utilities Corp. v. Thompson, 14 F.Supp. 318, affirmed 81 L.ed. 510; Everglades Drainage Dist. v. Florida Ranch & D. Corp., C.A. 5, 74 F.2d 914. Robinson v. Stevens, 249 F.2d 731, cert. den., 2 L.ed.2d 814; Asheim v. Pigeon Hole Parking Inc., 175 F.Supp. 320, affirmed 283 F.2d 288; Red Owl Stores v. Amalgamated Meat Cutters, Etc., 109 F.Supp. 629, appeal dismissed, 205 F.2d 959.

We thus submit that the undisputed proof is that Judge Moore had reasonable cause to believe that Appellant had wilfully testified falsely to a material point, i.e., a point on which she was relying as proof of her innocence, and that he did no more than bind her over until the District Attorney could read the record and determine himself whether or not to submit her case to the Grand Jury.

There is not a suggestion in either the pleadings or the record that the Grand Jury did not have adequate evidence to sustain the indictment. In Mississippi, primarily a common law state, no one can be tried for a felony such as perjury without the indictment of a Grand Jury and the Grand Jury hears the evidence, and by Section 2440 "the concurrence of twelve of the grand jurors shall be necessary to the finding of an indictment or making a presentment." If Judge Moore was in error and if the Grand Jury was in error, then Appellant will be acquitted on her perjury trial.

There is not one iota of testimony in the record as to any intent or purpose on the part of any of the Appellees to intimidate or hinder plaintiff in her civil rights work or to hinder or intimidate any civil rights workers by having an issue of whether or not she committed perjury submitted to a Grand Jury or in prosecuting the indictment brought in by the Grand Jury. There is not one iota of testimony as to any conspiracy between the defendants to proceed against Appellant without probable cause or to intimidate any civil rights worker. There is in fact no proof of any intimidation of anyone by Appellant's indictment.

Under this state of facts we submit there is no right upon the part of Appellant to any injunctive relief against the orderly prosecution of the perjury charge based on a Grand Jury indictment. If the State is denied this right, then the Courts are saying to this State that any person even generally or casually interested in civil rights activities can commit perjury to their heart's content and that nothing can be done to them.

POINT I

UNDER THE CIRCUMSTANCES HERE, A FEDERAL COURT WILL NOT STAY A PENDING STATE CRIMINAL PROCEEDING.

We submit to the Court that this is not an instance where an injunction can issue staying a pending criminal proceeding in a state court for either one of two grounds; i.e., such action is prohibited by 28 U.S.C., 2283, and is also prohibited by the policy of the Federal courts under the comity rule of not interfering with enforcement of state constitutional criminal statutes or staying a pending criminal action thereunder.

The crime of perjury is defined by Section 2315 of the Code (Appendix D). Prior to a conviction it requires a false statement under oath about a material matter and goes further and requires that the false statement be made "wilfully and corruptly". The Supreme Court of Mississippi is exceedingly careful in protecting the rights of a defendant in a perjury charge and strict in its requirement that the state has the burden of proof of every element making up the defense and that the same must be proved either by two witnesses or by one witness and corroborating circumstances. Nash v. State, 147 So.2d 499; Horn v. State, 191 So. 282; Whittle v. State, 30 So. 722.

There is no allegation of proof here that Appellant does not and will not have a full opportunity to defend the criminal proceeding. There is no factual basis for any contention that she will not receive a fair trial in the state court and there is a strong legal presumption to the contrary. Harrison v. NAACP, 360 U.S. 167, 3 L.ed.2d 1152; Hawk v. Jones, C.A. 8, 160 F.2d 807; NAACP v. Bennett, D.C. Ark., 178 F.Supp. 191; Browder v. City of Montgomery, D.C. Ala., 146 F.Supp. 127.

Appellant has an adequate remedy at law and can raise in this criminal proceeding all of the defenses to which she refers in her brief here (p. 23-27). She may be acquitted in the lower court. Even in the case of a conviction, she has the right to an appeal to the Supreme Court of the State of Mississippi and also, if she has then been denied any constitutional rights, an appeal to the Supreme Court of the United States.

The only injury that Appellant will suffer by failure of this Court to grant her injunctive relief is the necessity of defending herself in the criminal case and under all the authorities this is not such injury as justifies a federal court in enjoining a pending state court prosecution.

There are present here none of the facts which courts occasionally hold justify an exception to the rule of the inability or unwillingness of a federal court on the ground of comity to enjoin a state criminal procedure: There are not involved any cumulative severe penalties which would prevent Appellant from relying on her remedy in the state courts; there are involved no property rights and no irreparable injury to property or property rights is threatened.

There is not even a suggestion that the proceeding before the Grand Jury was not legal and valid and properly conducted with adequate evidence to sustain the indictment. There is no suggestion that the patently valid perjury statute is unconstitutional. This is primarily an attempt to enjoin an actual pending criminal action in the state court and not to enjoin threatened enforcement of an unconstitutional statute,* where there might conceivably be injury because the plaintiffs are unable to perform acts which they have a constitutional right to perform because of the imminent danger of criminal prosecution under an unconstitutional statute. No one has the constitutional right to commit perjury.

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* As will be discussed in more detail later.

28 U.S.C. §2283 prohibits the staying of a pending state criminal proceeding.

Title 28 U.S.C., Section 2283 provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Here such injunctive relief is not expressly authorized by any Act of Congress,* is not necessary in aid of the jurisdiction of the court below or this Court, or to protect or effectuate a judgment of the court below or this Court.

In H. J. Heinz Company v. Owens, U.S.C.A. 9th, 189 F.2d 505, that Court said:

> "Section 2283 of Title 28 of the United States Code, the present codification of a statute originally enacted in 1793, expressly deprives the courts of the United States of authority, subject to narrow exceptions not relevant here, to 'grant an injunction to stay proceedings in a State Court.' The Supreme Court has recently admonished that 'We must be scrupulous in our regard to the limits within which Congress (in Section 2283) has confined the authority of the courts of its own creation.' Toucey v. New York Life Ins. Co., 1941, 314 U.S. 118, 62 S.Ct. 139, 148, 86 L.Ed. 100."

In T. Smith & Son, Inc. v. Williams, U.S.C.A. 5th, 275 F.2d 397, this Court held that this statute requires a strict interpretation in order to accomplish the results desired by its enactment.

In Amalgamated Clothing Workers v. Richman Brothers, 348 U.S. 511, 99 L.ed. 600, the Court held:

> "We need not re-examine the series of decisions, prior to the enactment of Title 28 of the United States Code in 1948, which appeared to

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* To be discussed in more detail later.

> recognize implied exceptions to the historic prohibition against federal interference with state judicial proceedings. See Toucey v. New York Life Ins. Co., 314 US 118, 86 L ed 100, 62 S Ct 139, 137 ALR 967. By that enactment, Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation. . . . "

See also Williamson v. Puerifoy, C.A. 5, 316 F.2d 774, cert. den. 11 L.ed.2d 416; Warriner v. Fink, C.A. 5, 307 F.2d 933, cert. den. 9 L.ed.2d 969; Norwood v. Parenteau, C.A. 8, 228 F.2d 148, cert. den. 100 L.ed. 1478; Southern California Petroleum Corporation v. Harper, C.A. 5, 273 F.2d 715.

The statutory prohibition, of course, only applies to pending litigation and only prohibits the enjoining of a pending suit. Therefore, some cases making limited exceptions to the general equity rule not to enjoin threatened suits, which will be hereinafter discussed, have no application to the prohibition of the statute against the enjoining of a pending suit. Ex parte Young, 52 L.ed. 714, 209 U.S. 123; Babcock v. Noh, C.A. 9, 99 F.2d 738; Ackerman v. International Longshoremen's & W. Union, C.A. 9, 187 F.2d 860, cert. den. 96 L.ed. 646, 342 U.S. 859; Cline v. Frink Dairy Co., 71 L.ed. 1146.

Nor is the prohibition of the statute inapplicable merely because the suit purports to enjoin state officials rather than the state court itself. H. J. Heinz Co. v. Owens, C.A. 9, 189 F.2d 505; Sperry Rand Corp. v. Rothlein, C.A. 2, 288 F.2d 245; Furnish v. Board of Medical Examiners of California, C.A. 9, 257 F.2d 520; Amalgamated C. W. of A. v. Richman Bros., 99 L.ed. 600, 348 U.S. 511; Toucey v. New York Life, 86 L.ed. 100, 314 U.S. 118.

Actions brought under Civil Rights Act are not excepted from the prohibition of 28 U. S. C., 2283.

Appellant argues here that she is entitled to relief under 42 U.S.C. 1985 & 6 and 42 U.S.C. 1983. These statutes are part of the Civil Rights Act, or 42 U.S.C. 1981, et seq.

42 U.S.C. 1985 & 6, dealing with conspiracies to deprive citizens of their constitutional rights, does not provide for any injunctive relief and is limited to money damages. Section 1983 of 42 U.S.C. authorizes in cases of violation of civil rights a "suit in equity, or other proper proceedings for redress." However, it does not expressly authorize an injunction against a state criminal proceeding not known to equity and not a proper proceeding in equity, unless within one of the narrow exceptions not involved here, and does not broaden the established equitable injunctive jurisdiction. It is uniformly held that injunctions to stay state proceedings prohibited by 2283 are not authorized under the Civil Rights Act.

In Goss v. State of Illinois, C.A. 7, 312 F.2d 257, the plaintiff filed his complaint in the Federal court under 42 U.S.C. 1981, et seq., seeking to enjoin a criminal action instituted against him in the state court. In denying relief the Court stated:

> "Several decisions have pointed out that this section (2283) has not been modified nor is an exception engrafted thereon by the terms of the Civil Rights Act (42 U.S.C. Sec. 1981 et seq.) or the Declaratory Judgment Act (28 U.S.C. Sec. 2201 et seq.)...."

In Smith v. Village of Lansing, C.A. 7, 241 F.2d 856, the Village had brought a suit to require Smith to demolish a building which was alleged to be so physically deteriorated as to be a fire and health hazard. Smith filed a petition in the federal court alleging a conspiracy on the part of the Mayor and the Building Commissioner of the Village to deprive him of his property rights and his civil rights. The Court held that the alleged deprivation of civil rights by conspiracy did not justify an injunction to stay proceedings of the state court, stating:

> "...We hold there is nothing in the Civil Rights Act, Title 42 U.S.C.A. §1981 et seq., that suspends or modifies this statute. (2283) ... Of course, many litigants who are unsuccessful believe that they have been deprived of some constitutional rights, but the Fourteenth Amendment of the United States Constitution and the Civil Rights Act do not 'assure uniformity of decisions or immunity from merely erroneous action * * *.' Snowden v. Hughes, 321 U.S. 1, 15, 64 S.Ct. 397, 404, 88 L.Ed. 497.... The Federal Court does not guarantee a citizen against loss through erroneous decisions of State Courts on questions involving state law..."

In Sexton v. Barry, C.A. 6, 233 F.2d 220, the plaintiff sought in the federal court to enjoin a state supreme court from conducting pending proceedings and for mandatory injunction requiring the lower court to take other action in a probate proceeding. Plaintiff alleged that he had been denied his constitutional rights of due process and equal protection of the law because of fraud and collusion on the part of the state court judges. The Court in dismissing the bill first pointed out that it would not grant such relief "...where plaintiff alleged mere conclusions as to fraud and collusion of state court judges, and plaintiff's real grievance was that he had lost the case in state court." The Court then held that the Civil Rights Act did not create an exception to 2283.

The same result was arrived at by the court in 1900 in Aultman & Taylor Co. v. Brumfield, 102 F. 7, appeal dismissed 46 L.ed. 1265, citing with approval to the same effect Hemsley v. Myers, 45 F. 283. The Court in that case held that a federal court, after a state court has once acquired jurisdiction of a case, would not and could not interfere and that the present Sec. 2283 did not "permit a federal court to entertain a bill to restrain a county treasurer from proceeding in an action in a state court. . . although in the proceeding in which such prima facie case was made the requirement of due process of law was not observed, contrary to the fourteenth amendment to the United States constitution. . .' . . .The section (now 1983) does not repeal, limit, or restrict the previously existing rules affecting the relations of the state and the United States courts, nor does it abolish the distinction between law and equity, or change the rules of pleading or mode of proceeding in any respect. . . . No new mode of proceeding is enacted, and no new right created by this section. . . .'" (Emphasis added.)

The only case cited by Appellant in opposition to our position that this action is prohibited by 28 U.S.C.A. 2283 is United States v. Wood, C.A. 5, 295 F.2d 772.* That case, as this Court well knows, merely involved an action brought by the Attorney General of the United States in the name of the United States under 42 U.S.C. 1971. From the limited facts before the Court at that time, on an appeal from the denial of a temporary restraining order, it appeared that one Hardy, while attempting to assist Negro citizens in exercising their right to vote, was struck and then arrested for breach of the peace on charges "known to be unjustified" for the purpose of punishing Hardy for his registration activities. This Court did no more than remand the case for a hearing on a motion for preliminary injunction and specifically stated that it was not passing on or intimating any views as to the merits of the claim of the United States. The Court did hold that the federal court had jurisdiction, if justified by the facts after the hearing, to enjoin the prosecution of the breach of the peace case against Hardy. It did so however only because the suit was brought by the United States and did so on two grounds: (1) the Court held that it would not interpret 28 U.S.C.A. 2283 as applicable to a suit brought by the United States; (2) the suit was brought under 42 U.S.C.A. 1971, dealing only with voting rights, which specifically granted to the United States, but only to the United States, the right to bring an action for preventive relief "including an application for a permanent and a temporary injunction" for violation of the provisions of that statute.

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* None of the other 33 cases in the brief even refer to this statute or come within its prohibition but as will be pointed out hereinafter practically every case relied on merely dealt with the right of a federal court to enjoin future enforcement by state officers of state criminal statutes which are unconstitutional on their face.

Also the general policy of the federal court not to interfere with state criminal proceedings applies and applies even where 42 U.S.C. 2283 is not applicable.

The general rule, based on comity, is as applicable to actions brought under the Civil Rights Act as to any other type of action.

The leading case, brought under the civil rights act, is, of course, Douglas v. Jeannette, 319 U.S. 157, 87 L.ed. 1324. There certain members of Jehovah's Witnesses had been arrested for soliciting and distributing religious literature under a municipal ordinance prohibiting solicitation without procuring a license from the City authorities. Plaintiff sought injunctive relief. The Court, in denying it, stated:

> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guarantees, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. * * * It does not appear from the record

> that petitioners have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith..."

In the recent case of Cleary v. Bolger, 371 U. S. 392, 9 L.ed. 2d 390, the Supreme Court of the United States cited with approval Douglas v. Jeannette, supra, and held:

> "...To permit such claims to be litigated collaterally, as is sought here, would in effect frustrate the deep-seated federal policy against piecemeal review."

In Henderson v. Trailway Bus Company, 194 F.Supp. 423, affirmed 10 L.ed.2d 1044, 374 U.S. 488, the Court, in denying injunctive relief, held:

> "... Irreparable injury to the plaintiffs through submission of their contentions in this manner to the State tribunals is not demonstrated. This circumstance obviously undermines all foundation for the injunction claimed." (Emphasis added.)

See also Wojcik v. Palmer, C.A. 7, 318 F.2d 171.

See the language of this Court in Galfas v. City of Atlanta, C.A. 5, 193 F.2d 931, as follows:

> "The well established rule that courts of equity will not ordinarily restrain criminal prosecutions is peculiarly appropriate to be applied by the federal court where the threatened action is prosecution in the State Court by State officers of an alleged violation of state law....
>
> "The assertion of a claim of deprivation of civil rights affects no abrogation of the rule. Stefanelli v. Minard, 1951, 72 S.Ct. 118...." (Emphasis added.)

See O'Connor v. O'Connor, C.A. 5, 315 F.2d 420.

Furthermore, in Ackerman v. International Longshoremen's & W. Union, C.A. 9, 187 F.2d 860, cert. den. 96 L.ed. 646, 342 U.S. 859, no exceptional circumstance was held to exist to justify injunctive relief by a federal court by the mere fact that a proceeding in the state court was not prosecuted in good faith; i.e., that the motives of the state officials in the state criminal proceeding would not justify federal court intervention by injunction.* The Court first held that the prosecution of a criminal case could not be enjoined because of a possible psychological or mental hazard to other parties. The Court then held:

> "...The trial court did not undertake to cite any case in which proof of bad faith in a criminal prosecution was held to establish reason for departure from the ordinary rule that a court of equity will not entertain a suit to enjoin criminal prosecutions. ... The trial court recognized that 'the motive of the prosecutor is of course not relevant to the ordinary criminal proceeding.'
>
> "We cannot bring ourselves to believe that a defendant in a criminal case, who would not be permitted to plead or prove as a defense to the charge, that the prosecutor's motives were bad, could nevertheless by alleging such bad faith and the invalidity of the criminal statute, move into a court of equity and have those issues tried there. No case has been called to our attention which has applied the trial court's theory that proof of bad faith in the criminal prosecution is sufficient to warrant enjoining the criminal proceedings."**

The Court in the above opinion then cited as substantiating its holding: Kentucky v. Powers, 50 L.ed. 633, 201 U.S. 1; Mooney v. Holohan, 294 U.S. 103, 79 L.ed. 791; Exparte Hawk, 321 U.S. 114, 88 L. ed. 572.

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* There is no evidence here that the prosecution was in bad faith. However, we merely point out that this would not be an exception at present.

** If it can be said that United States v. Wood, 295 F.2d 772, even indicates the contrary, it would only be in its holding that 42 U.S.C. 1971 granting a cause of action by way of injunction to the United States, but only to the United States, in cases of intimidation or threats was from its legislative history construed to give the United States government the right by this civil statute to perform the same function that it could in 28 U.S.C.A. 241 and 242, making it a crime against the United States to conspire to or "wilfully" deprive persons of constitutional rights. This is not an action by the United States government.

The Ackerman case was cited with approval in Stefanelli v. Minard, 342 U. S. 117, 96 L.ed. 138. (See Note 12, 96 L.ed. @ 144).

In the Ackerman case it was pointed out that the only exceptions to the policy of the federal courts, on the ground of comity, of not enjoining criminal prosecutions in the state court only existed under all of the following circumstances: (1) The prosecutions to be enjoined were not pending prosecutions but merely threatened future prosecutions; (2) The criminal statute prevented parties from doing a perfectly legal act and an act which they had a constitutional and legal right to perform; and, most important of all, (3) The criminal statutes, the enforcement of which was to be enjoined, were unconstitutional on their face.

None of these exceptions are present here. Technically, this is an appeal only from a petition to enjoin the actual prosecution of a pending suit. However in the complaint Appellant seeks an injunction against any other such indictment for perjury of Plaintiff or any other person of her class. Neither plaintiff nor any other person has any legal or constitutional right to commit perjury in the future and be free from prosecution therefor. Moreover, there is not even a suggestion that the Mississippi criminal statute defining the crime of perjury is unconstitutional.

And yet Appellant in her brief has relied entirely on cases where the Courts have held that there existed these circumstances which excepted the case from the rule of comity, i.e., where the Court was enjoining future prosecutions; where the criminal statute involved actually forbade the performance of legal acts; and where the criminal statute itself was void on its face because unconstitutional.

For example, Appellant relies on Morrison v. Davis, C. A. 5, 252 F.2d 102, which merely justified an injunction against future threatened prosecution of the statute forbidding integration on public transportation facilities and making citizens subject to criminal punishment for performing the legal act of riding on integrated buses, which said criminal statute was unconstitutional on its face. Similarly limited is the holding in Bailey v. Patterson, C.A. 5, 323 F.2d 201, relied on by Appellant.

In each of the following cases relied on by Appellant there was involved the enjoining of threatened future prosecutions and there were present exceptional circumstances where the statutes which were the basis of the prosecution which was sought to be enjoined prohibited citizens from performing a legal and constitutional act and the criminal statute itself was unconstitutional on its face: City of Houston v. Dobbs Co., 232 F.2d 428; Bush v. Orleans Parish School Board, 194 F.Supp. 182; Browder v. Gayle, 142 F.Supp. 707, affirmed 352 U.S. 903, 1 L.ed.2d 114; State of Louisiana v. NAACP, 181 F.Supp. 37, affirmed 366 U.S. 293, 6 L.ed.2d 301; Truax v. Reich, 239 U.S. 33, 60 L.ed. 131; Hague v. CIO, 307 U.S. 496, 83 L.ed. 1423; Cline v. Frink Dairy Co., 274 U.S. 445, 71 L.ed. 1146. In two cases relied on by Appellant the Court merely remanded the case to the lower court for a further decision as to whether or not the statute was unconstitutional so as to justify injunctive relief: Jordan v. Hutcheson, 323 F.2d 597, based on NAACP v. Button, 9 L.ed.2d 405, and A.F. of L. v. Watson, 327 U.S. 582, 90 L.ed. 873. In the latter case the case was remanded to await an interpretation by the state court of the statute in that its constitutionality would depend upon the interpretation given it by the state court.

Appellant has relied on several cases, inapplicable here, where the Court enjoined the future enforcement of unconstitutional statutes where the enforcement thereof would irreparably deprive plaintiffs of valuable property rights. Pierce v. Society of Sisters, 268 U.S. 510, 69 L.ed. 1070; Terrace v. Thompson, 263 U.S. 197, 68 L.ed. 255; Hynes v. Grimes Packing Co., 337 U.S. 86, 93 L.ed. 1231; Denton v. City of Carrollton, 235 F.2d 481; Hale v. Bimco Trading Co., 306 U.S. 375, 83 L.ed. 771.

Two other cases relied on and not in point are McNeese v. Board of Education, 373 U.S. 668, 10 L.ed.2d 622, and Watson v. Memphis, 373 U.S. 526, 10 L.ed.2d 529. These cases did not involve enjoining the enforcement of any criminal statute, but merely were cases ordering the immediate integration of schools and parks.

These are all of the cases relied on by Appellant.* None of them are, of course, in point on the issue of the right of federal court to enjoin a pending state criminal proceeding nor even future prosecutions under a state criminal statute where the criminal statute is constitutional.

State officers cannot, we submit, be enjoined from enforcing a statute making it a crime under certain limited circumstances to commit perjury. Whether or not the statute was erroneously enforced in any one instance would depend upon the particular facts of that case and a person charged and tried would have ample opportunity to raise any constitutional question in the State court proceeding. A civil rights worker has no more right to be held to be perfectly free to commit perjury without prosecution than any other class of citizen. A federal court has never enjoined prosecution for violations of valid constitutional criminal statutes where the guilt or innocence of the persons would depend in each case upon varied circumstances. This Court cannot purport to determine in advance whether a civil rights worker in the future should or should not ever be prosecuted for perjury. Certainly this Court would not say to civil rights workers that they were at all times and under any circumstances immune from such prosecution and could commit perjury as freely as they so desired.

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* We are unable to find Aelony v. Pace, Harris v. Pace (3 Judge Ct. M.D. Ga., November 1, 1963), no citation being given.

The issue is controlled by Douglas v. Jeannette, 319 U.S. 157, 87 L.ed. 1324, where the Court stated:

> "... It (the equity jurisdiction of a federal court) does not ordinarily extend to cases where there are numerous parties and the issues between them and the adverse party--here the state-- are not necessarily identical. ... Far less should a federal court of equity attempt to envisage in advance all the diverse issues which could engage the attention of state courts in prosecutions of Jehovah's Witnesses for violations of the present ordinance, or assume to draw to a federal court the determination of those issues in advance, by a decree saying in what circumstances and conditions the application of the city ordinance will be deemed to abridge freedom of speech and religion."

POINT II.

AS A CUMULATIVE DEFENSE: AS A MATTER OF FACT APPELLANT HAS FAILED TO PROVE THAT SHE OR ANYONE ELSE HAD BEEN DENIED CONSTITUTIONAL RIGHTS BY THESE APPELLEES OR HAVE A RIGHT TO ANY RELIEF UNDER THE CIVIL RIGHTS STATUTES.

We have heretofore pointed out that the mere deprivation of some civil right or constitutional right does not entitled a party to have a federal court enjoin a pending state criminal action and does not entitle him to injunctive relief against the future prosecutions for violation of constitutional criminal statutes. We here, however, go further and would point out to the Court that even assuming these civil rights statutes gave rights to such injunctive relief, which they do not, that there was no proof here of any violation of any constitutional rights by these Appellees and no cause of action even for damages proved under any civil rights statute. We submit:

Appellant proved no cause of action under Sections 42 U.S.C. 1985 and 1986 arising out of a conspiracy.

Appellant's complaint stated a cause of action based only on conspiracies in violation of Sections 42 U.S.C. 1985 and 1986. Apparently, Appellant knew that if injunctive relief against criminal prosecutions was to be obtained the only possibility thereof would be under allegations of conspiracy. Appellant knew that there was no right to enjoin a pending action in the face of 28 U.S.C. 2283 unless there was possibly some exception where a conspiracy was charged. However, no case was cited to that effect by Appellant and, we submit, cannot be cited. Appellant knew that there was no right to injunctive relief against future prosecutions for perjury under a constitutional perjury statute unless there was possibly some justification therefor because of allegations of conspiracy under 42 U.S.C. 1985. However, Appellant has not purported to cite any authority justifying such injunctions even if there had been a conspiracy and, we submit, cannot do so. Moreover, 1985 and 1986 grant only right of relief by way of damages and no equitable relief.

Moreover, Appellant completely and wholly failed to prove any conspiracy. The complaint in fact should have been dismissed because it fails to state a cause of action. Allegations of conspiracy in the nature of conclusions unsupported by facts specifically pled will not withstand a motion to dismiss. Sexton v. Barry, C.A. 6, 233 F.2d 220; McGuire v. Todd, C.A. 5, 198 F.2d 60; Tucker v. National Linen, C.A. 5, 200 F.2d 858; Moffett v. Commerce Trust Co., 87 F.Supp. 438, affirmed C.A. 8, 186 F.2d 707, cert. den. 96 L.ed. 661, holding that the law presumes the good faith of a public officer and a complaint must state facts from which there is an inevitable conclusion that he used the office for the sole object or purpose of depriving the plaintiff of her constitutional rights. See also Morgan v. Sylvester, 125 F.Supp. 380, affirmed 220 F.2d 758, cert. den. 100 L.ed. 768.

Appellant proved no actual conspiring together of any of the Appellees to prosecute Appellant for perjury or for the specific purpose of and with deliberate intent to deprive her of constitutional rights. Appellant realizes this and takes the position in her brief (page 43) that the mere fact that the various officers had some part in some step in the prosecution is alone sufficient to prove or establish a conspiracy.* If this were true merely because various steps of a state court procedure necessitated separate acts being performed by different state officials, then every legal prosecution would constitute a conspiracy. The mere fact that each of several persons perform some acts in producing a result or even act in concert or jointly does not constitute a conspiracy. To be a conspiracy there must be collusion and an actual agreement and actual meeting of the minds of one or more persons with the agreed intent and purpose to perform an illegal act. Rubenstein v. Dr. Pepper Company, C.A. 8, 228 F.2d 528; Windsor Theatre Co. v. Walbrook Amusement Co., 94 F.Supp. 388, affirmed 189 F.2d 797; Skolnick v. Spolar, 317 F.2d 857, cert. den. 11 L.ed.2d 145; Boyer v. Garrett, 88 F.Supp. 353, affirmed 183 F.2d 582, cert. den. 95 L.ed. 659.

In Tennessee Electric Power Co. v. T. V. A., 83 L.ed. 543, 306 U.S. 118, the Court stated:

> "Cooperation by two federal officials... does not spell conspiracy to injure their business. As the court below held, such cooperation does not

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* Of course most of the Appellees had nothing to do with the prosecution and had no power or authority to stop the prosecution after the indictment.

> involve unlawful concert, plan, or design, or cooperation to commit an unlawful act or to commit acts otherwise lawful with the intent to violate a statute."

In Mississippi Power & Light Co. v. Town of Coldwater, Miss., 106 So. 2d 375, the Mississippi court quoted with approval a statement in 15 C. J. S., Conspiracy, p. 997, et seq., as follows:

> "Furthermore there must be a preconceived plan and unity of design and purpose, for the common design is of the essence of the conspiracy. The mere fact that each of several defendants acted illegally or maliciously with the same end in view does not constitute a conspiracy, unless such acts were done pursuant to a mutual agreement."

Appellant has failed to prove that Appellees have deprived any person of civil rights resulting in a cause of action arising under 42 U.S.C. 1983 and this is not a proper class action.

Appellant herself has been denied no constitutional rights. She is merely being required, like any other citizen, to stand trial in a criminal prosecution in the state court after an arrest on probable cause and grand jury indictment. This is not a denial of civil rights under Section 1983.

Mere errors or irregularities in state court proceedings do not constitute a deprivation of civil rights. See Sarelas v. Sheehan, C.A. 7, 326 F.2d 490, holding:

> "The events that gave rise to plaintiff's 'rights' on which he bases his action, are not of constitutional stature, vindicable under the Civil Rights statutes. Constitutional due process and equal protection of the laws have a more fundamental meaning than plaintiff ascribes to them in this action. Mere errors and irregularities occurring in a judicial proceeding must be differentiated from a situation where the proceeding itself is a sham or nullity."

Cf. Skolnick v. Spolar, C.A. 7, 317 F.2d 857, cert. den. 11 L. ed.2d 145; Jennings v. Nester, C.A. 7, 217 F.2d 153, cert. den. 99 L.

ed. 1281.

Cf. also Hanna v. Home Insurance Co., C.A. 5, 281 F.2d 298.

Even in suits for money damages no cause of action under 42 U.S.C. 1983 arises on account of state court actions unless the state proceedings were an absolute nullity or a contrivance instituted with wilful and malicious intent to deprive of constitutional rights and with no factual justification for the proceedings and no probable cause therefor,* i.e., not mere errors of judgment or errors in finding of facts or mistake of the officers. Sarelas v. Sheehan, C.A. 7, 326 F.2d 490; Johnson v. Stone, C.A. 7, 268 F.2d 803; Bottone v. Lindsley, C.A. 10, 170 F.2d 705, cert. den. 93 L.ed. 1101; Basista v. Weir, 225 F.Supp. 619.

Even in United States v. Wood, C.A. 5, 295 F.2d 772, where Hardy was assaulted and then arrested on charges "known to be unjustified", the Court pointed out that "In the argument here, and in the court below, the government makes very clear that the rights the government asserts are not the rights of Hardy; it assumes that Hardy will obtain a fair trial and that the existence of adequate state remedies will protect all of Hardy's constitutional rights." The Court then held that the federal courts had jurisdiction only because it was a class suit under 1971, without any determination of and with a specific reservation of any finding on the merits in such a class suit.**

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* Not, however, as pointed out, a justification of injunctive relief. That the pending perjury charge against Appellant is not a nullity is pointed out under Point III of this brief.

** The cause of action was under 42 U.S.C. 1971, and the government had a duty under 1971 to prevent intimidation of a class. Prevention of intimidation of a class however was given only to the government and only by that section and 1971 is not involved here.

Here no class action can be justified and no deprivation of rights of a class has been shown. Appellant does not purport to prove or attempt to prove that she has been, by her prosecution for perjury, prevented in any way from her activities for civil rights or has been threatened with any other prosecution for perjury if she continues such activities. In fact, her counsel stated that what he desired to prove was a denial of civil rights to "others" (R. 95). And yet no person has testified or offered to testify that they have been hindered or delayed or prevented in any way from the prosecution of civil rights efforts by this perjury charge against Appellant. There was no proof or any offer of proof that Appellees have threatened to or intend to prosecute anyone else for perjury, and certainly not to prosecute anyone else for perjury merely because they were engaged in civil rights activities.

The mere possibility of future denial of civil rights is not sufficient. Dawley v. City, 159 F. Supp. 642, affirmed 260 F.2d 647, cert. den. 3 L.ed.2d 636; Poe v. Ullman, 367 U.S. 497, 6 L.ed.2d 989; Clark v. Thompson, D.C. Miss., 206 F.Supp. 539, affirmed 313 F.2d 637, cert. den. 375 U.S. 951, 11 L.ed.2d 312.

Furthermore, it is fantastic and illogical that one prosecution of one person for perjury would have the result of preventing other persons from other collateral activities merely because the person being prosecuted was incidentally engaged in the same collateral activities. The burden of proof was upon the Appellant to show that any damage from the acts of Appellees "resulted as a natural or probable consequence of the acts alleged." Schaefer v. Macri, C.A. 9, 196 F.2d 162. For example, the fact that a truck driver was indicted for perjury in a case arising out of an accident on the highway would not naturally or probably deter other truck drivers from using the highways in accordance with their constitutional right.

Moreover, a class action is not justified by the Civil Rights Act here involved. No statute gives an individual a cause of action for any alleged intimidation of a class.* There must be actual deprivation of civil rights, as was pointed out in Ackerman v. International Longshoremen's, supra, and Hanna v. Home Insurance Co., supra. No case can be found justifying an injunction against the enforcement of even an unconstitutional statute because it might operate as a psychological obstacle to collateral activities or might constitute a mental hazard. The same reasoning, if it was sound, would have justified an injunction in Douglas v. City of Jeannette, supra.

However, the lack of justification of a class action here can be based merely on the fact that the description of the purported class is too vague and indefinite.

Clearly this is not a proper class action. The vague and indefinite description of the purported class depends upon the state of mind of a particular individual, rendering it difficult, if not impossible, to determine whether any given individual is within or without the alleged class. The members of a class must be capable of definite identification as being either in or out of it.**

In Clark v. Thompson, 206 F.Supp. 539, affirmed 313 F.2d 637, cert. den. 10 L.ed.2d 1053, 374 U.S. 830, the Court, in holding that there was no proper class action, used the following language:

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* As pointed out, 1961 gives a cause of action for intimidation but only to the United States government.

** By paragraph 2 of the Complaint the class is described as: "...each and all other persons similarly situated who are workers for the end of racial discrimination and segregation in Mississippi, for the encouragement of the exercise by Negroes in Mississippi of their right to vote and to register to vote, and for the exercise and preservation of civil rights generally in Mississippi, whether such other persons are paid or not paid to act as such workers." This would include thousands of persons, depending on their own mental attitude.

> "... One plaintiff testified that he purported to represent all Negroes in Jackson. Another testified that he purported to represent all Negroes in the United States. The third plaintiff testified that she purported to represent all races of peoples in the world. ... Neither the identity of the purported class nor the right and ability of the plaintiffs to represent same has been established.
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> * * *
>
> "This is not a proper class action, and no relief may be granted other than that to which the plaintiffs are personally entitled. Whether this is a proper class action involves a question of fact... The plaintiffs cannot make this a legitimate class action by merely calling it such. ... The burden of proof on this issue was on the plaintiffs. ... The plaintiffs failed to meet this burden. ..."

In Giordano v. Radio Corporation of America, C.A. 3, 183 F.2d 558, the Court held: "The members of the class must, therefore, be capable of definite identification as being either in or out of it."

Even if a psychological obstacle to persons expending efforts for civil rights constituted a denial of civil rights, whether or not any particular civil rights worker was subjected to any psychological obstacle or mental hazard would depend upon the particular facts with reference to and characteristics of that individual. In a class action for the deprivation of civil rights each member of the class must be subjected to the same discrimination and where the discrimination does not exist as against the class as a whole but must be determined as to each individual, there is no proper class action.

See Mitchell v. Wright, D.C. Ala., 62 F.Supp. 580. In that case the class sought to be represented were all Negroes in the state "who...possess all the qualifications to be registered as voters and possess none of the disqualifications of voters." The Court held that this was too indefinite and not recognized as a class by the public or anyone as a group or class: "There is not such a group or class in esse as to make it a class action." The Court then pointed out that the Court itself could not organize a class or devise a class or set up a class and identify them so that they might have the necessary characteristics to be denominated a class for the purpose of bringing a class action.

In Reddix v. Lucky, C.A. 5, 252 F.2d 930, the appellant brought the complaint on behalf of himself and all other Negro voters of Ouachita Parish, who had been summarily challenged in April and May, 1956. This Court in holding that it was not a proper case for a class action, stated: "Obviously the right of each voter depends upon the actions taken with respect to his own case. ... The fact that each voter must allege and prove the circumstances that might add up to an illegal purge, makes it inappropriate, if not impossible, for a single plaintiff to represent them in a class action."

Who are "workers", either paid or unpaid, "for the exercise and preservation of civil rights generally in Mississippi?" No one could possibly know and it would apparently take in a majority of the population. Which one of them would be deprived of any constitutional rights by the prosecution of this Appellant for a charge of perjury? Or by the prosecution of anyone for perjury? Or how many of them would be deterred from their activities because they were afraid that they might be prosecuted for perjury? Certainly not every person working in the State of Mississippi for the preservation of civil rights generally.

Also, why should people interested in preservation of civil rights be free from prosecution even if they commit perjury while other citizens who might not be particularly interested in this field could be convicted of perjury. It would be, we submit, an unconstitutional classification which the Court would be making should it sustain Appellant here.

POINT III.

APPELLANT HAS BEEN DENIED NO CONSTITUTIONAL RIGHTS BY THE ACTUAL PROCEEDINGS OR PROCEDURE IN THE STATE COURT.

Appellant does not take the position that the Mississippi perjury statute is unconstitutional (Appendix D). It patently is not.

Appellant merely takes the position that she has been denied the constitutional right of due process of law by the collateral procedure leading up to the pendency of her trial for perjury. Her position is, we submit, not well taken.

For example: Appellant complains of Sections 2479 and 2480, Mississippi 1942 Code, (Appendix C) because it authorizes a trial judge in a case being tried before him to bind a witness over to the grand jury if he has "testified in such manner as to induce a reasonable presumption that he has wilfully and corruptly testified falsely to some material point or matter. ..." Appellant takes the position that the statute is void because too vague and indefinite.* It is only a criminal statute or a statute creating a crime that is unconstitutional unless it clearly defines the crime.

Section 2479, a procedural statute, is not vague and indefinite as to what the judge must find before he commits a person to the grand jury. The testimony must have induced a reasonable presumption of perjury. This is no more nor no less than saying that the judge must act on "probable cause." A reasonable presumption of guilt is probable cause.

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* And yet Appellant cites no case whatsoever purporting to so hold. Any statute which requires conduct is void as against those who must obey the commands of the statute if it is too vague. This is all that the cases cited by Appellant hold; i.e., Cramp v. Board of Public Instruction, 7 L.ed.2d 285; Baggett v. Bullitt, 12 L.ed.2d 377; Bouie v. Columbia, 12 L.ed.2d 894.

However, Judge Moore would not have needed to have even acted under this statute to have bound Appellant to the grand jury. Any officer and even private citizens under certain conditions can make arrests without a warrant and if it is an arrest for a felony, the person arrested must be bound over to the grand jury. Section 2470 of the Mississippi Code provides:

> "An officer or private person may arrest any person without warrant for an indictable offense committed, or a breach of the peace threatened or attempted in his presence."*

The rule in Mississippi is that arrests under this statute are valid if the arresting officer or individual had probable cause to make the arrest and that the existence of probable cause is not controlled or affected by the final judgment in the criminal case; i.e., the crime does not have to actually be committed in the presence of the officer and the officer does not have to have unequivocal proof that the crime has been committed, probable cause for making the arrest being sufficient. Millette v. State, 148 So. 788.

In Forsythe v. Ivey, Miss., 139 So. 615, the plaintiff was arrested for drunkenness in a public place without a warrant. It later developed that he was not drunk but was suffering from some mental and physical temporary disorder which gave the appearance of drunkenness. The Court stated:

> "...the evidence in this case clearly presents a case where the policemen were warranted in believing that the plaintiff was drunk at the time of the arrest."

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* The entire text of Section 2470 is attached hereto as Appendix F.

See also Baldwin v. State, 167 So. 61; Copeland v. State, 30 So. 2d 509.

In People v. Galpern, N. Y., 181 N.E. 572, cited with approval in Thomas v. State, Miss., 160 So.2d 657, the Court pointed out that reasonable discretion must be left to officers making such arrests as to whether or not they should be made. Other cases from other states holding such arrests valid if there is probable cause therefor include Director General v. Kastenbaum, 68 L.ed. 146, 263 U.S. 25; Carr v. National Discount, C.A. 6, 172 F.2d 899; Bucher v. Krause, C.A.7, 200 F.2d 576, cert. den. 97 L.ed. 1404; Mueller v. Powell, C.A. 8, 203 F.2d 797.

In Henry v. United States, 4 L.ed.2d 134, 361 U.S. 98, the Supreme Court, in discussing the necessity for probable cause in an arrest without a warrant, stated:

> "Evidence required to establish guilt is not necessary. ... Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. ... If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent."

This would be particularly true where the crime itself was such that the officer could not determine with precision the commission thereof. Here there was unquestionably probable cause for Judge Moore to exercise his discretion in ordering the commitment to the grand jury. Appellant objects on the ground that part of the "probable cause" was facts known to the judge from outside sources. This would almost always be true in a perjury case.

In McBride v. State, 73 So.2d 154, the Court held:

> "In prosecution for contempt of court for violation of temporary injunction issued in suit to have defendant's premises declared a common nuisance, Chancellor did not deal unfairly or prejudicially with defendant, as regards his guilt and sentence, because at conclusion of his find-

> ings and pronouncement of sentence, Chancellor ordered defendant held under bond to await action of grand jury on a charge of perjury, though information on which he based such charge was obtained aliunde the record. Code 1942, §2479."

Also in Clanton v. State, 50 So.2d 567, the Court held that no prejudice or bias would be presumed on the part of the judge acting under this statute. See also McInnis v. State, 32 So.2d 444.

Moreover, the issue of "probable cause" is determinable in the perjury case and only in the perjury case.

It is undisputed that the manner of arrest is not denial of due process after a case has been investigated by the grand jury and the defendant has been held by it to answer for the crime. See United States v. Fred Washington, C.A.7, 253 F.2d 913[*], where the Court held:

> "The contention of the defendant-appellant Fred Washington that he was arrested without probable cause and thereby deprived of his constitutional rights is without merit. ... They... had probable cause sufficient to make the arrest.[**] ...Moreover, subsequent to his arrest the Grand Jury investigated and returned the indictment in the case at bar. ... It is well settled law that one may be arrested 'by persons without any warrant, or without any previous complaint, and brought before a proper officer, and this may be in some sense said to be "without due process of law." But it would hardly be claimed, that after the case had been investigated and the defendant held by the proper authorities to answer for the crime, he could plead that he was first arrested "without due process of law."' Ker v. Illinois, 1886, 119 U.S. 436, 440, 7 S.Ct. 225, 227, 30 L.ed. 421."

While an illegal detention by officers may avoid a confession during that period, this rule "does not arise from constitutional sources".

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[*] Reversed on other grounds, 2 L.ed.2d 368; i.e., that the later conviction was not sustained by the evidence.

[**] A search and seizure without a warrant is constitutional if there is probable cause therefor. Brinegar v. United States, 93 L.ed. 1879, 338 U.S. 160; Carroll v. United States, 69 L.ed. 543, 267 U.S. 132.

Palakiko v. Harper, 209 F.2d 75,* and cases cited.

In Green v. State of Maine, 113 F.Supp.253, the Court stated:

> "...However, I may as well point out ... that even an illegal arrest does not render a subsequent trial constitutionally invalid, Frisbie v. Collins, 1952, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed.541; that a search of the person upon arrest violates no federal constitutional right, see United States v. Rabinowitz, 1950, 339 U.S. 56, 60, 70 S.Ct. 430, 94 L.Ed. 653...."

In these cases the Courts were dealing with admitted illegal arrests. Here the arrest was upon probable cause. At least the judge here firmly believed that he had probable cause to make the arrest. If in fact he did not have probable cause, although this was substantiated by the indictment by the grand jury and the evidence here, it would constitute merely an error on the part of the trial judge and not a denial of constitutional right.

Appellant makes no charges against the grand jury and does not take the position that the action of the grand jury in indicting her was unconstitutional or the result of any conspiracy or for the purpose of depriving her of constitutional rights. The grand jury heard evidence and necessarily made a finding of probable cause. No attack is made thereon or no position taken that she was deprived of any rights by such a finding.

However, Appellant does take exception to and allege unconstitutionality of the formal written indictment, i.e., the wording thereof. See Appendix E. The indictment shows that she was being indicted for perjury and sets out the exact testimony for which she was being indicted. True, it does not set forth the statute making perjury a crime. It sets forth that she committed the perjury in a misdemeanor case in the Hinds County court and while it does not give the name of the case it gives the number thereof. It specifically alleges that Appellant did "Wilfully falsely and corruptly swear and testify as follows". It is totally immaterial as to the exact nature of the misdemeanor case in which she testified, it specifically alleging that "said testimony being material to the issues of said trial".

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*Certiorari denied, 74 S.Ct. 683.

Section 2446 of the Mississippi Code provides:

> "§2446. Indictment--formalities dispensed with.
>
> "The words 'force and arms' or the words 'contrary to the form of the statute,' or any other merely formal or technical words, shall not be necessary in an indictment if, without them, the offense be certainly and substantially described."

The indictment clearly sets forth that it is for perjury and it is not necessary under Mississippi law that the number of the section of the Code constituting the crime be specifically set out. Rogers v. State, 22 So.2d 550.

Russell v. United States, 8 L.ed.2d 240, 369 U.S. 749, cited by Appellant, held an indictment void under the Federal Rules of Criminal Procedure and under a special Federal Criminal Statute making it an offense for a witness before a congressional committee to refuse to answer questions pertinent to the question under inquiry. The court merely held that the indictment did not state the nature of the offense. It appeared that the defendant himself did not know what the question under inquiry was at the Committee hearing and the Committee hearing records did not reflect. Here, of course, the Appellant knew exactly what the misdemeanor case was about and the number thereof is given and the records of the Court would reflect the nature of the misdemeanor.

However, this is a matter which should be raised by demurrer to the indictment or motion to quash the indictment and raised in the state court. It is matter of state law, not of federal law, and there is no constitutional right to require a state to require any particular form of indictment. The sufficiency of the language of indictments in the federal criminal proceedings is determined by reference to the Fifth and Sixth Amendments to the Constitution.* Amendments V and VI to the Federal Constitution are applicable only to prosecutions in a federal court and not to prosecutions in a state court. State v. Kraft, La., 37 So.2d 815; Withers v. Buckley, 15 L.ed. 816, 20 How. 84; Tucker v. State, Miss., 90 So. 845. There is in fact no federal constitutional requirement that a criminal be tried for a felony only after an indictment, i.e., a state indictment is not even necessary at all for due process. Sawyer v. State, Fla., 113 So. 736, and cases cited including Hurtado v. People, 28 L.ed. 232, 110 U.S. 516.

However, this, as stated, is a question which can be and should be raised in the state court. If a defendant is convicted and it is affirmed by the Supreme Court and the indictment deprives him of constitutional rights, then an appeal should be taken to the Supreme Court of the United States.

All of the above cases, including the ones relied on by Appellant, were cases of direct appeals from actual convictions; i.e., in the criminal case itself. It is universally held that a defendant in a criminal action has no right to injunctive relief where the statute creating the crime is constitutional and deprives him of no constitutional rights purely for procedural due process or alleged procedural errors.

In Stefanelli v. Minard, 96 L.ed. 138, 342 U.S. 117, the defendant in a criminal action sought injunctive relief in a federal court to prevent the use of evidence obtained by an admittedly illegal search and seizure from being introduced on the ground that the introduction of such evidence deprived him of constitutional rights. The Court, in denying the injunction, stated:

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* For example see: Roberts v. United States, C.A. 6, 226 F.2d 464, cert. den. 100 L.ed. 817; Mellor v. United States, C.A. 8, 160 F.2d 757, cert. den. 91 L.ed. 1858.

> "... No such irreparable injury, clear and imminent, is threatened here. At worst, the evidence sought to be suppressed may provide the basis for conviction of the petitioners in the New Jersey courts. Such a conviction, we have held, would not deprive them of due process of law. Wolf v. Colorado, 338 US 25, 93 L ed 1782, 69 S Ct 1359, supra.
>
> "... If the federal equity power must refrain from staying State prosecutions outright to try the central question of the validity of the statute on which the prosecution is based, how much more reluctant must it be to intervene piecemeal to try collateral issues.
>
> "The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law--with its far-flung and undefined range-- would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court-- all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution."

The Stefanelli Case was cited and followed in the recent case of Pugach v. Dollinger, 365 U.S. 458, 5 L.ed.2d 678, the Court readopting the Stefanelli rule that there was no irreparable injury for procedural errors and that the federal court will not intervene piecemeal to try

collateral issues.

No case has been cited, and we submit that no case can be cited, where a federal court has issued an injunction against a pending state criminal procedure because of procedural defects during the pendency thereof. The only relief against illegal restraint is habeas corpus, and this under the peculiar and strict requirements of the statute. Brown v. Rayfield, 320 F.2d 96. The only relief against procedural errors during the trial, if depriving the defendant of constitutional rights, is by appeal to the Supreme Court at the conclusion of the trial. Habeas corpus, under 28 U.S.C.A. 2254, might, in a sense, be called an exception to 28 U.S.C. 2283 prohibiting federal courts interfering by injunction with pending state criminal proceedings. It is the only statutory method of interfering therewith. If it is not applicable, which it is not under Brown, then 28 U.S.C. 2283 specifically prevents any injunction issuing.

CONCLUSION

While this is technically an appeal from a denial of a preliminary injunction seeking only to enjoin prosecution of Appellant's own suit, a full hearing was granted to Appellant in the court below. At the conclusion of this full hearing Appellant failed to show the right to any permanent relief prayed for in the complaint and showed no irreparable injury and no injury beyond the necessity of defending her own criminal case. Appellant states that some affidavits attached to her brief are to show the Court what will be proven on the final hearing. The affidavits have nothing to do with the merits of Appellant's claim and could not affect her rights under the above cited authorities.

We, therefore, think that there is no necessity for any further hearing in the Court below and that this case should be affirmed and the complaint dismissed.

If we are in error in this, then this Court, we submit, should affirm the lower court in denying the limited temporary injunction and the case should be remanded for a full hearing on the other issues.

Respectfully submitted,

JOE T. PATTERSON, Attorney General of
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Jackson, Mississippi

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By______________________________
Attorneys for Appellees.

CERTIFICATE

The undersigned of counsel for Appellees certifies that a true and correct copy of the foregoing Brief has this day been mailed by United States mail, postage prepaid, to:

Paul O'Dwyer
O'Dwyer & Bernstien
50 Broad Street
New York 4, New York

R. Jess Brown
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Jackson, Mississippi

Carl Rachlin
38 Park Row
New York, New York

attorneys of record for Appellant.

This the_____day of March, A. D. 1965.

____
OF COUNSEL.

APPENDIX A - Section 963 of the Ordinances of the City of Jackson, Revised 1938

Disorderly Conduct.

963. To use rude, boisterous, offensive, obscene or blasphemous language in any public place, or to make, aid, countenance or assist in making any improper noise, disturbance, breach of peace, or diversion, or conduct one's self in a disorderly manner in any public place, or in any other place, to the annoyance of others.

LEA NOLO CONTENDERE

DISPOSITION $100.00 FINE

Docket No. 49878

CITY AFFIDAVIT

APPEALED

STATE OF MISSISSIPPI
COUNTY OF HINDS
CITY OF JACKSON

№ 17820
299-32

THIS DAY, Personally appeared before me, the undersigned, Clerk of the Police Court of the City of Jackson,

Miss., J.L. Ray

ho being duly sworn makes affidavit that Lois C. Chaffee

Tougaloo, Miss.

n or about June 23th 196 3, in the corporate limits of Jackson, First District of Hinds County,

Mississippi,

Did then and there wilfully and unlawfully

disturb the peace by Loud & Boisterious Language

Contrary to the laws and ordinances in such cases made and provided.

J L Ray Affiant

Sworn to and subscribed before me this 13th day of June 196 3

L. G. PUCKETT

Clerk of the Police Court of the City of Jackson

By Deputy Clerk

PO-1—20M—10-60

APPENDIX C - Section 2479, Mississippi 1942 Code.

§2479. Court to commit palpable perjurer at once.

Whenever it shall appear to any court that a witness or party who has been sworn or examined in any case, matter, or proceeding pending before the court, has testified in such manner as to induce a reasonable presumption that he has wilfully and corruptly testified falsely to some material point or matter, the court may immediately commit such party or witness, by an order of process for that purpose, to prison, to take bond or recognizance with sureties for his appearing and answering to an indictment for perjury.

APPENDIX D - Sections 2315 and 2316, Mississippi 1942 Code

§2315. Perjury--wilful and corrupt false swearing.

Every person who shall wilfully and corruptly swear, testify, or affirm falsely to any material matter under any oath, affirmation, or declaration legally administered in any matter, cause, or proceeding pending in any court of law or equity, or before any officer thereof, or in any case where an oath or affirmation is required by law or is necessary for the prosecution or defense of any private right or for the ends of public justice, or in any matter or proceeding before any tribunal or officer created by the Constitution or by law, or where any oath may be lawfully required by any judicial, executive, or administrative officer, shall be guilty of perjury, and shall not thereafter be received as a witness to be sworn in any matter or cause whatever, until the judgment against him be reversed.

§2316. Perjury--punishment of.

Persons convicted of perjury shall be punished by imprisonment in the penitentiary as follows: For perjury committed on the trial of any indictment for a capital offense or for any other felony, for a term not less than ten years; for perjury committed on any other judicial trial or inquiry, or in any other case, for a term not exceeding ten years.

APPENDIX F

INDICTMENT

THE STATE OF MISSISSIPPI,
First District, Hinds County.

CIRCUIT COURT
November Term, A. D., 1963
FIRST JUDICIAL DISTRICT
OF HINDS COUNTY.

The Grand Jurors for the State of Mississippi, taken from the body of good and lawful men of the First Judicial District of Hinds County, in the State of Mississippi, elected, impaneled, sworn, and charged to inquire in and for said District, County and State aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present: That

Lois C. Chaffee

in said District, County and State on the 15th day of October, A. D., 1963 then and there having been sworn and being under oath as a witness in a trial upon an affidavit charging a misdemeanor in Hinds County Court, First Judicial District, Hinds County, Miss., Cause Number 13791, did wilfully, falsely and corruptly swear and testify as follows, to-wit: "The children would hold onto the flags and they were lined up, and they had two police going down, getting on either side one at a time, and the police would grab their flags and they had their sticks ready and if the children would hold onto their flags, they crack their sticks - in effect, everybody who was holding on to their flag was getting their head cracked and being clubbed down, and - - ", and further at said time and in the manner and form aforesaid the said Lois C. Chaffee did wilfully, falsely and corruptly swear and testify, "So, the policemen would grab the flags and pull at it, and if there was any resistance, just with the other hand he'd knock them over the head and knock them on the ground. I mean, these billy clubs inflict a bad blow," and further at said time and in the manner and form aforesaid she did wilfully, falsely and corruptly swear and testify, "I would say I saw three or four incidents where I was sure they were hit by the police, but I only saw one child fall with blood gushing and all, you know, right in front of me. I saw lots of bloody heads, ---", all of which said testimony and false swearing the said Lois C. Chaffee well knew to be false, and fraudulent, and said testimony being material to the issues of said trial, all of which

contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

John H. Fox III
District Attorney.

APPENDIX F - Section 2470, Mississippi 1942 Code.

§2470. Arrests--when made without warrant.

An officer or private person may arrest any person without warrant, for an indictable offense committed, or a breach of the peace threatened or attempted in his presence; or when a person has committed a felony, though not in his presence; or when a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it; or on a charge, made upon reasonable cause, of the commission of a felony by the party proposed to be arrested. And in all cases of arrests without warrant, the person making such arrest must inform the accused of the object and cause of the arrest, except when he is in the actual commission of the offense, or is arrested on pursuit.